IN THE

Supreme Court of the United States

October Term, 1976

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 75-748

FRANK IREY, JR.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, AND JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

No. 75-746

ATLAS ROOFING COMPANY, INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION AND JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND FIFTH CIRCUITS

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OPINIONS BELOW

1. The Irey Case [No. 75-748]

The *en banc* opinion of the Court of Appeals for the Third Circuit is reported at 519 F.2d 1215 and appears at Irey Cert. App. at 1a-25a.[1] The panel opinion of the Court of Appeals is reported at 519 F.2d 1200 (Irey Cert. App. at 1b-26b). The order and opinion of the Occupational Safety and Health Review Commission is reported at 4 OSAHRC 1 (1973) (Irey Cert. App. 1c-8c). The order and opinion of the Occupational Safety and Health Review Commission Administrative Law Judge is reported at 4 OSAHRC 8 (1973) (Irey Cert. App. at 1d-21d).

2. The Atlas Case [No. 75-746]

The opinion of the Court of Appeals for the Fifth Circuit is reported at 518 F.2d 990 (Atlas Cert. App. at 1a-29a). The order and opinion of the Occupational Safety and Health Review Commission is reported at 3 OSAHRC 19 (1973) (Atlas Cert. App. at 1b-13b).

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[1] The designation "Irey Cert. App." refers to the Appendix to the petition for certiorari in the *Irey* case. The designation "Atlas Cert. App." refers to the Appendix to the petition for certiorari in the *Atlas* case. The designation "J. App." refers to the Joint Appendix filed by the parties after certiorari was granted.

JURISDICTION

The judgment of the Court of Appeals upon rehearing in the *Irey* case, was entered on July 24, 1975. A timely Application for An Extension of Time to File Petition For Writ of Certiorari was filed, and an Order was entered extending the time for filing to and including November 21, 1975. The judgment of the Court of Appeals in the *Atlas* case was entered on September 8, 1975.

The petitions for certiorari in both cases were filed on November 21, 1975. On March 22, 1976 this Court granted the petition in both cases limited to Question 2 presented in each petition. J. App. at 40a-41a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) in both cases.

QUESTION PRESENTED

Whether a defendant in a governmental proceeding for a monetary "civil penalty" under Section 17 of the Occupational Safety and Health Act of 1970, 84 Stat. 1608, 29 U.S.C. § 666, is entitled under the Seventh Amendment to a trial by jury before final judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment and other relevant provisions of the Constitution of the United States are reprinted at Irey Cert. App. at 1f-2f.

The Occupational Safety and Health Act of 1970 (hereinafter referred to as "OSHA" or "the Act"), 29 U.S.C. § § 651 *et seq.*, is reprinted at Irey Cert. App. at 1e-31e.

STATEMENT

1. The Statutory Scheme

OSHA was passed by Congress pursuant to its powers to regulate commerce (§ 2(b), 29 U.S.C. § 651, Irey Cert. App. at 1e) and is applicable to all non-governmental employers engaged in a business which affects commerce. § 3(5), 29 U.S.C. § 652(5), Irey Cert. App. at 2e. The purpose of the Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . ." Section 2(b), 29 U.S.C. 651, Irey Cert. App. at 1e.

Section 5(a)(1) of the Act (29 U.S.C. § 654(a)(1), Irey Cert. App. at 4e) directs each employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." Section 5(a)(2) also commands employers to "comply with occupational safety and health standards promulgated under this Act." Section 6 (29 U.S.C. § 655, Irey Cert. App. at 4e) authorizes the Secretary of Labor to promulgate occupational safety or health standards under rule-making procedures. Violation of either § 5(a)(1) (the "general duty clause") or § 5(a)(2) (which covers any

regulation promulgated by the Secretary) makes an employer liable to "civil penalties" under Section 17, 29 U.S.C. § 666, Irey Cert. App. at 17e-18e.

Section 17(a)-(c) creates a three-fold classification for civil penalties. An employer who "willfully or repeatedly" violates OSHA "may be assessed a civil penalty of not more than $10,000 for each violation." Section 17(a). An employer who is cited for a "serious violation" *shall* be assessed a civil penalty of up to $1,000 for each violation. Section 17(b). An employer cited for "such violation . . . specifically determined not to be of a serious nature" *may* be assessed a civil penalty of up to $1,000 for each violation. Section 17(c). The Act defines a "serious violation" as existing in a place of employment "if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Section 17(k), 29 U.S.C. § 17(j), Irey Cert. App. at 18e.[2]

Section 17(e) (29 U.S.C. § 666(e), Irey Cert. App. 18e) imposes a criminal penalty of not more than

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[2] The term "willfully" is not defined in the Act, but the Third Circuit panel decision in the *Irey* case defines the term as follows (Irey Cert. App. at 12b):

> Willfulness connotes defiance or such reckless disregard of consequences as to be equivalent to a knowing, conscious, and deliberate flaunting of the Act. Willful means more than merely voluntary action or omission–it involves an element of obstinate refusal to comply.

$10,000 fine or six months imprisonment for any willful violation causing the death of an employee.

Section 8(a) of the Act authorizes inspectors of the Department of Labor upon presentation of appropriate credentials to enter the workplace without delay at reasonable times and to inspect and investigate in a reasonable manner for violations of the Act. 29 U.S.C. § 657(a)[3] Irey Cert. App. at 9e-11e. The inspector may take testimony and require production of documents under oath (§ 8(b), 29 U.S.C. § 657(b)) and records specified by regulation must be kept under the Act. § 8(c), 29 U.S.C. § 657(c).

Section 9(a) (29 U.S.C. 658(a), Irey Cert. App. at 12e) authorizes the inspector to issue a citation to the employer if, upon inspection or investigation he believes the employer has violated either the general duty clause or a regulation or order promulgated under the Act. The citation states with particularity the nature of the violation and in addition "shall fix a reasonable time for the abatement of the violations." *Id.*

Section 10(a) (29 U.S.C. § 659(a), Irey Cert. App. at 12e) then authorizes the Secretary within a reasonable time after the termination of the inspection or investigation to notify the employer by certified mail of the penalty, if any, proposed under Section 17 of the Act. If the employer fails to notify the Secretary within

[3] In *Brennan v. Gibsons Products, Inc.*, 407 F.Supp. 154 (E.D. Tex 1975) a three-judge District Court construed this section of OSHA to require the Secretary to secure a search warrant under probable cause standards appropriate to administrative searches. *See* See v. City of Seattle, 387 U.S. 523 (1967). The government has been granted an extension of time within which to seek review of this decision.

15 days of his intention to contest the citation or the proposed penalty, the citation, the penalty, and the obligation to correct the cited violation all become final and unreviewable.[4]

Section 10(c) (29 U.S.C. § 659(c), Irey Cert. App. at 12e-13e) provides for a hearing before the Occupational Safety and Health Review Commission ("the Commission") held pursuant to the provisions of the Administrative Procedure Act (5 U.S.C. § 554) upon notice of contest of the citation, the proposed penalty, or the time period specified for abatement.

The Commission is established pursuant to Section 12, 29 U.S.C. § 661, Irey Cert. App. at 14e-16e. The Commission's proceedings are all "of record" and "unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal

[4] Section 10(b) of the Act (29 U.S.C. § 659(b), Irey Cert. App. at 12e) provides that if the Secretary has reason to believe the employer has failed to correct the violation within the time specified for correction in the original citation, the Secretary shall send notification by certified mail of failure to correct and the penalty proposed to be assessed under Section 17(d) of the Act, 29 U.S.C. §666(d), Irey Cert. App. at 17e. Section 17(d) authorizes a daily penalty of "not more than $1,000 for each day during which such failure or violation continues." Section 10(b) provides for suspension of the time period within which the employer must correct the violations until final order of the Commission if the employer contests the original citation, but *only if* the Commission concludes the employer initiated the administrative proceedings "in good faith and not solely for delay or avoidance of penalties." Section 10(b), 29 U.S.C. §659(b), Irey Cert. App. at 12e. If the employer contests the Section 10(b) notice of failure to correct or the proposed daily penalty, he may secure an administrative hearing with limited judicial review under Sections 10(c) and 11(a) of the Act.

Rules of Civil Procedure." Section 12(g), 29 U.S.C. § 661(b), Irey Cert. App. at 15e. Section 12(i), 29 U.S.C. § 661(i) provides for hearings initially before a hearing examiner appointed by the Commission, whose report becomes final unless further review by the Commission is directed. Under Section 17(j) of the Act, 29 U.S.C. § 666(i), Irey Cert. App. at 18e, the Commission is given authority "to assess all civil penalties provided in [Section 17], giving due consideration to the appropriateness of the penalty with respect to the size of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations."[5]

Under Section 11(a) of the Act, 29 U.S.C. § 660(a), Irey Cert. App. at 13e-14e, orders of the Commission are made reviewable in the Court of Appeals if the employer files a petition within sixty days.[6] Section 11(a) provides:

[5]The Commission claims the power to increase the proposed penalty even if the employer's decision to contest is in good faith under Section 10(b) of the Act. See the Third Circuit panel decision in the *Irey* case, Irey Cert. App. at 4b n.3.

[6]Section 11(a) of the Act provides that "[t]he commencement of proceedings under this subsection shall not, unless ordered by the Court, operate as a stay of the order of the Commission."

Section 11(b) of the Act (29 U.S.C. 660(b), Irey Cert. App. at 14e) authorizes the Secretary to seek review or enforcement of

(Footnote continued on next page)

> "The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive."

Decisions of the Court of Appeals are reviewable on certiorari in this Court pursuant to 28 U.S.C. § 1254.

Section 17(1) of the Act (29 U.S.C. § 666(k), Irey Cert. App. at 18e) provides:

> "Civil penalties owed under this chapter shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation is alleged to have occurred or where the employer has its principal office."

(Footnote 6 continued from last page)

any final order of the Commission in the Court of Appeals and provides:

> "In any such case, as well as in the case of a noncontested citation or notification by the Secretary which has become a final order of the Commission under subsection (a) or (b) of section 10, the clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary and the employer named in the petition. In any contempt proceeding brought to enforce a decree of a court of appeals entered pursuant to this subsection or subsection (a), the court of appeals may assess the penalties provided in section 17, in addition to invoking any other available remedies."

As the Third Circuit panel in the *Irey* case below noted (Irey Cert. App. at 6b n. 7):

> "In the House debate, it was stated that this provision should be narrowly construed and was intended to be limited to any process which might be necessary to actually collect the penalty. 116 Cong. Rec. 42207 (1970). Contrast this procedure with the one provided by the Coal Mines Health and Safety Act, 30 U.S.C. § 819(a)(3), where Findings of Fact are required before a penalty is assessed and where an employer is entitled to a limited *de novo* hearing in the District Court . . . ."

See also the *en banc* Third Circuit decision in *Irey*, Irey Cert. App. at 3a n. 2.

Finally, Section 13 of the Act, 29 U.S.C. § 662, Irey Cert. App. at 16e-17e, authorizes injunction proceedings in Federal District Court upon petition of the Secretary "to restrain any conditions or practices in any place of employment which are such that a danger exists which could reasonable be expected to cause death or serious physical harm immediately or before the imminence of such danger could be eliminated through the enforcement procedures otherwise provided by this Act."

2. The *Irey* Case and the Third Circuit's Opinions

Petitioner Frank Irey, Jr., Inc. [hereinafter "Irey"] is a general contractor whose construction site was inspected after a report to the Occupational Safety and

Health Review Commission that one of petitioner's employees had died on the site. The employee was killed when the side of a trench in which he was digging collapsed. The inspection took place on January 12 and 13, 1972, and on March 22, 1972, petitioner was served with a Citation for Serious Violation (J. App. at 6a-9a) and a Notification of Proposed Penalty (J. App. at 10a-13a) for one "willful and serious" violation, one "serious" violation, and five non-serious violations. The proposed administrative penalty assessed against petitioner for the willful and serious violation was a fine of $7,500 (J. App. at 10a) and a direction that it abate the condition "immediately". J. App. at 6a.[7]

Irey served a Notice of Contest within the time period allowed and the Secretary thereafter filed a Complaint with the Commission (J. App. at 14a-20a), and Irey filed an Answer denying any violation of the Act. J. App. at 21a-24a.[8]

A hearing was held on the Secretary's Complaint on June 27, 1972, before a hearing examiner of the Occupational Safety and Health Review Commission. At the hearing, Irey moved to dismiss the Secretary's Complaint on grounds of the unconstitutionality of the enforcement procedures of the Act. On November 13, 1972, the administrative hearing examiner rendered a

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[7] The hearing examiner reduced the penalty on the willful violation to $5,000. Irey Cert. App. at 20d.

[8] The willful violation alleged was that Irey violated the Secretary's applicable regulation by failing to adequately support the sides of the trench in which its employee was killed. Secretary's Complaint, para. IV, J. App. at 15a. The facts underlying the allegation are discussed at pp. 80-82, *infra*.

decision affirming certain violations, imposing a $5,000 penalty for the willful violation, and denying the motion to dismiss. Irey Cert. App. at 1d-21d. The Commission directed review of the decision on December 14, 1972, requesting the parties to brief the issue of whether the penalty should be raised to $10,000, (Irey Cert. App. at 4b n.3), and rendered a decision on August 1, 1973, affirming the examiner's decision. Irey Cert. App. at 1c-8c.

Irey petitioned for review and the Court of Appeals, Circuit Judge Gibbons dissenting, held in its judgment and opinion issued on November 4, 1974, that the enforcement procedures of the Act did not contravene Article III or the Fifth, Sixth, or Seventh Amendments to the Constitution, but remanded the case to the Commission for a new determination as to whether the violation committed by Irey was willful, because the Commission had applied an erroneous definition of "willful" in its initial decision. The majority opinion states that "[t]here is force and logic to [Irey's] arguments, and we do not dismiss them lightly," (Irey Cert. App. at 7b) and that, "[i]n the case *sub judice*, candor compels us to concede that the punitive aspects of the OSHA penalties, particularly for a 'willful' violation, are far more apparent than any 'remedial' features." *Id.*

The opinion went on to point out that "[m]uch of petitioner's opposition is centered on the fact that the civil penalties are imposed, not through normal judicial processes but by administrative action – that is, by the executive branch with very narrow review." Irey Cert. App. at 8b. Despite having "serious misgivings as to the wisdom of limiting *de novo* review" and characterizing the denial of a jury trial as "another disturbing element

of this case", the majority rejected this challenge to the constitutionality of OSHA's enforcement procedures. Irey Cert. App. at 8b n. 11.

However, the court then felt compelled to state, at considerable length and with no small amount of force, that it had apparently concluded that *de novo* trial on the merits *should* be afforded. "We perceive no overriding consideration which favors the congressional policy of recent years to insulate administrative adjudication from the open and searching examination, that full jucicial review provides." Irey Cert. App. at 9b n.11.

Irey thereafter filed a timely Petition for Rehearing, which was granted by the Court of Appeals on December 20, 1974, and the case was set to be reargued before the Court of Appeals sitting *en banc*. On July 24, 1975, after reargument and rebriefing, the Court of Appeals by a six-to-four vote, Circuit Judges Gibbons, Aldisert, Hunter, and Garth dissenting, issued its judgment and opinion determining that the judgment of the panel should stand, both as to the constitutionality of the Act and its enforcement procedures and the definition of willfulness. The majority held that this Court, in the case of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), had ruled that the Seventh Amendment did not apply to administrative adjudications "and that Congress is free to provide an administrative enforcement scheme without the intervention of a jury at any stage." Irey Cert. App. at 8a.

The *en banc* majority recognized that the Seventh Amendment requirement of a jury verdict "could be met in a *de novo* trial in the district court on appeal

from an administrative agency" and reiterated that OSHA's failure to provide any more than limited judicial review raises the question of whether this procedure violates the Seventh Amendment. Irey Cert. App. at 2a. The majority apparently continued to share the panel majority's reservations about "the wisdom or desirability of such an administrative adjudicatory process." Irey Cert. App. at 8a-9a.

3. The *Atlas* Case and The Fifth Circuit's Opinion[9]

Petitioner Atlas Roofing Company, Inc. [hereinafter "Atlas"] is a roofing subcontractor whose construction site was inspected after a report to the Occupational Safety and Health Commission that one of Petitioner's employees had died on the site when he fell through a roof opening. On June 15, 1972, the Secretary issued a citation for one "serious" violation with a direction that the condition be abated "immediately." J. App. at 26a-27a. The proposed civil penalty assessed by the OSHA area director for the violation was $600.00. J. App. at 28a-29a.

Atlas served a timely notice of contest and the Secretary thereafter filed a Complaint with the Occupational Safety and Health Review Commission. J. App. at 31a-35a. Petitioner filed an Answer denying any violation of the Act. J. App. at 36a-39a.[10]

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[9] The dissenting opinions in the Third Circuit are discussed at pp. 41-42; 56-59, *infra*.

[10] The serious violation alleged against Atlas was that Atlas violated the Secretary's applicable regulation by failing to provide and maintain a cover or standard railing on all exposed sides for the opening on the roof through which the employee fell. Secretary's Complaint, para. IV, J. App. at 32a.

Atlas moved on August 30, 1972, before the Commission for a jury trial and for procedural due process, and also moved to dismiss on the grounds that OSHA and its enforcement procedures are unconstitutional. These motions were denied for lack of jurisdiction. Atlas Cert. App. at 4a n.6.

A hearing was held on the Secretary's Complaint on November 2, 1972, before a hearing examiner of the Occupational Safety and Health Review Commission. The administrative hearing examiner rendered a decision affirming the violation and the penalty as well as denying the motion to dismiss. Atlas Cert. App. at 1b-13b. The hearing examiner's decision subsequently became the final order of the Commission under § 12(j) of the Act, 29 U.S.C. § 661(i), (Irey Cert. App. at 15e) because no member of the Commission directed review of the decision within 30 days of its filing.

Atlas petitioned for review and the Court of Appeals for the Fifth Circuit, in an opinion by Chief Judge Brown filed on September 8, 1975, held that the enforcement procedures of the Act did not contravene Article III or the Fifth, Sixth, or Seventh Amendments to the Constitution. Atlas Cert. App. at 1a-29a. The Court rejected Atlas' contention that even if the penalties are civil in nature, "the Seventh Amendment requires that Congress provide a system of enforcement that gives employers the opportunity to put their case before a jury in a de novo proceeding in the District Court." *Id.* at 25a.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases present the question of the right to jury trial under the Seventh Amendment in the context of the Occupational Safety and Health Act, which has been characterized as a "seemingly unique piece of legislation . . . ." *Lance Roofing Co. v. Hodgson*, 343 F. Supp. 685, 686 (N.D. Ga.), *aff'd*, 409 U.S. 1070 (1972). U.S. 1070 (1972).

In drafting OSHA, Congress devised a most unusual administrative enforcement scheme. Unlike the overwhelming majority of statutory schemes for the determination of civil penalties, the OSHA procedure gives the administrative agency the full power to adjudicate a violation and to assess a punitive monetary penalty subject only to very limited judicial review and without any right on the defendant's part to invoke the participation of a jury at any stage in the proceedings. The OSHA scheme is as far reaching as it is unusual; thus the statute applies to virtually every employer in the country, and, as the Fifth Circuit pointed out in the *Atlas* case, the OSHA model for strict administrative imposition of civil penalties with very limited judicial review and no jury rights has been recommended as a model for the enforcement systems of all administrative agencies for the future. Atlas Cert. App. at 6a.

A defendant in proceeding to determine liability for an OSHA monetary civil penalty has a Seventh Amendment right to a jury prior to final judgment of liability for the penalty. *First*, the historical background of the Seventh Amendment and the Judiciary Act of

1789, Ch. 20, 1 Stat. 73 *et seq.*, demonstrates that the Seventh Amendment was intended to apply to federal governmental proceedings seeking monetary civil penalties against individuals for violations of federal statutes. *See* pp. 20-31, *infra*.

Second, under all of the major analytical criteria set forth in this Court's Seventh Amendment cases for determining the scope of the Seventh Amendment, a civil penalty proceeding qualifies as a suit at common law within the meaning of the Seventh Amendment. Under English common law at the time of the enactment of the Seventh Amendment, *see Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935), a governmental proceeding for a civil penalty for violation of a statute would have been triable to a jury, whether the proceeding was brought by a representative of the Crown or by an informer on behalf of the Crown. *See* pp. 34-38, *infra*. A civil penalty proceeding, and particularly a civil penalty proceeding in the context of OSHA, cannot in any sense be analogized to a proceeding in equity (or admiralty). *See Parsons v. Bedford*, 28 U.S. [3 Pet.] 443, 447 (1830), *quoted with approval* in *Ross v. Bernhard*, 396 U.S. 531, 533 (1970) and *Curtis v. Loether*, 415 U.S. 189, 193 (1974). And, an OSHA proceeding for an in personam monetary civil penalty is a suit "for the recovery of a money judgment. . . ." *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891), *quoted with approval* in *Pernell v. Southall Realty*, 416 U.S. 363, 370 (1974). A governmental proceeding for a civil penalty, then, is classically a suit at common law within the meaning of the Seventh Amendment. In fact, civil penalty proceedings for monetary penalties or forfeiture of

property have been consistently recognized in the federal courts from the Nation's birth down to the present as common law actions carrying a Seventh Amendment jury right. *See* pp. 38-42, *infra*. If Congress had placed the OSHA penalty adjudication in a United States District Court in the first instance rather than an administrative tribunal, Irey and Atlas would unquestionably have a Seventh Amendment right to a jury.

Both lower courts here ruled in reliance principally on this Court's decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937) that the Seventh Amendment is not applicable when Congress places the governmental proceeding in an administrative agency rather than a United States District Court. The lower courts misread *Jones & Laughlin*, which only holds that Congress could permit the NLRB to grant a back pay award as incidental to the NLRB's power to grant statutory remedies primarily equitable in nature. *See* pp. 46-56, *infra*. In the OSHA context, the monetary civil penalty adjudication cannot in any sense be analogized to monetary relief incidental to equitable remedies. *See* pp. 65-68, *infra*.

Since a civil penalty proceeding is a suit at common law within "the clear command of the Seventh Amendment," *Curtis v. Loether, supra*, 415 U.S. at 198, a right to trial by jury must be provided at some stage prior to final judgment without regard to policy considerations. *See* pp. 71-75 *infra*.

In any event, policy considerations favor recognition of a right to trial by jury to determine liability for an OSHA civil penalty before final judgment.

First, and most importantly, since an OSHA civil penalty proceeding is a governmental proceeding against the individual which, at the very least, comes close to the line which divides "criminal" from "civil" proceedings for constitutional purposes, there are unique and overriding policy considerations under this Court's cases interpreting the constitutional values underpinning the jury right generally for recognizing the right to trial by jury in these cases. *See Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *cf. United States v. United States District Court*, 407 U.S. 297, 313 (1972). *Second*, as these two cases illustrate, the factual issues involved in determining violations of OSHA are not only well within the range of the "practical abilities and limitations of juries," *Ross v. Bernhard, supra*, 396 U.S. at 538 n. 10, but actually best suited for jury determination. *See* pp. 78-83, *infra*. *Third*, experience with the overwhelming majority of statutory schemes for civil penalties which permit *de novo* district court review with a right to trial by jury refutes any contention that recognition of such a right in the context of an OSHA civil penalty adjudication would result in crowding the dockets of the district courts or overburdening the administration of justice. *See* pp. 83-85, *infra*. *Fourth*, there is no likelihood of substantial interference with the agency's law enforcement goals, even assuming *arguendo* that this is a legitimate policy interest that the government might advance to defeat the claim of jury right, because *de*

novo review in district court would come after the administrative process is complete. *See* pp. 86-87, *infra.*

I.

A DEFENDANT IN A PROCEEDING TO DETERMINE LIABILITY FOR A MONETARY CIVIL PENALTY FOR VIOLATION OF A STATUTE HAS A SEVENTH AMENDMENT RIGHT TO A JURY BEFORE FINAL JUDGMENT.

A. The Historical Background of the Seventh Amendment Demonstrates that the Amendment is Particularly Applicable to Governmental Civil Penalty Proceedings.

As this Court observed in *Parsons v. Bedford,* 28 U.S. [3 Pet.] 433, 446 (1830), "one of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases." Indeed, "of the seven States which, in ratifying the Constitution, proposed amendments, six included proposals for the preservation of jury trial in civil cases." *See Galloway v. United States,* 319 U.S. 372, 398 n. 3

(1943) (Black, J., dissenting.)[11] In *Colgrove v. Battin,* 413 U.S. 149, 152-56 (1973), this Court summarized the debates during and after the Federal Convention in Philadelphia concerning whether or not the new Constitution should include an express guarantee of the civil jury right. As the historical materials quoted in *Colgrove* demonstrate, the rationale for omitting an express civil jury guarantee from the Constitution was that: (a) the variety of practices among the several states with respect to "common law" jury rights prohibited an effective general provision in the Constitution preserving the right as to civil trials and

[11] *See also* Henderson, "The Background of the Seventh Amendment," 80 Harv. L. Rev. 289, 295 (1967):

> "The Constitution was signed and transmitted to the Continental Congress on September 17, 1787. George Mason and Edmund Randolph of Virginia and Elbridge Gerry of Massachusetts refused to sign the document, and several other members of the Convention had left before the final session. Within a month, the whole country was divided into Federalist and anti-Federalist parties. The almost complete lack of any bill of rights was a principal part of the anti-Federalist argument; the lack of provision for civil juries was a prominent part of this argument, and the Supreme Court's appellate jurisdiction in law and in fact was treated by the anti-Federalists as a virtual abolition of the civil jury . . . ."

In refusing to sign the new Constitution, Mr. Gerry stated as one of his principal objections to the document that it gave Congress the power "to establish a tribunal without juries, which would be a Star-chamber as to civil cases." Records of the Federal Convention of 1787, at 633 (M. Ferrand, ed. 1937).

(b) that the Congress could safely be entrusted with the task of regulating the scope of the jury right. *See also The Federalist* No. 83 (A. Hamilton).[12] The critical point about these various contentions is that the Congress and the country rejected them by enacting the Seventh Amendment.

The Amendment was considered and enacted upon by the same Congress that passed the Judiciary Act of 1789, Ch. 20, 1 Stat. 73 *et seq.* In giving analytical content to the scope of the jury right as created by the Seventh Amendment, this Court has taken recourse to the contemporaneous delineation of civil jury rights in the Judiciary Act of 1789. *See, e.g., Parsons v. Bedford, supra,* 28 U.S. [3 Pet.] at 447; *Colgrove v. Battin, supra,* 413 U.S. at 153-55 n. 8. As this Court observed in *Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265, 297 (1887):

> "[The Judiciary Act of 1789] . . . was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning."

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[12] Alexander Hamilton devoted Federalist No. 83 entirely to the civil jury trial issue, noting at the outset that "The objection to the plan of the convention, which has met with most success in this State, and perhaps in several of the other States, is *that relative to the want of a constitutional provision* for the trial by jury in civil cases." *See* The Federalist No. 83, at 495 (The New American Library of World Literature, ed. 1961) (emphasis in original).

The Ninth Section of the Federal Judiciary Act of 1789, 1 Stat. 73, 76-77, provided (emphasis added):

> "SEC. 9. And be it further enacted, That the district courts(c) shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; (a) saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, *and of all suits for penalties and forfeitures incurred, under the laws of the United States.* (b) And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States. (c) And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except

> for offences above the description aforesaid. (d) *And the trial of issues in fact, in the district courts in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.*"

In construing this language in connection with the Seventh Amendment in *Parsons v. Bedford, supra,* 28 U.S. [3 Pet.] at 447, the Court observed (emphasis added):

> "In a just sense, the Amendment then may well be construed to embrace *all suits which are not of equity and admiralty jurisdiction,* whatever may be the peculiar form which they may assume to settle legal rights. And Congress seems to have acted with reference to this exposition in the Judiciary Act of 1789, Ch. 20 (which was contemporaneous with the proposal of this Amendment); for in the Ninth Section it is provided that 'the trial of issues in fact in the district courts in all causes, except the civil causes of admiralty and maritime jurisdiction, shall be by jury;' and in the Twelfth Section it is provided that 'the trial of issues in fact in circuit courts shall in all suits, except those of equity and of admiralty and maritime jurisdiction, be by jury;' and again in the Thirteenth Section, it is provided that 'trial of issues of fact in the Supreme Court in all actions at law against citizens of the United States shall be by jury.'"

See also Capital Traction Co. v. Hof, 174 U.S. 1, 9-10 (1899). Thus, the Judiciary Act, as originally passed, explicitly took cognizance of "all suits for penalties and forfeitures incurred, under the laws of the United States" and explicitly classified those suits as suits to be tried by a jury. In the face of this legislative history, contemporaneous with the enactment of the Seventh Amendment itself – which must be taken as "weighty evidence" of the "true meaning" of the Seventh Amendment, *cf. Wisconsin v. Pelican Insurance Co.,*

supra, – the government's position that Congress may abolish the historic right to a jury in an in personam civil penalty action simply by shifting the focus of the action to an administrative tribunal strikes at the heart of our Constitutional heritage and judicial system as it was conceived by the Framers of the Bill of Rights.[13]

The position of the authors of the Seventh Amendment and the Judiciary Act of 1789 on jury participation in governmental attempts generally to levy fines and penalties on the people of this country was but a natural reflection of an historic battle with the English Crown which began before the Revolution and played a significant part in the events leading to the Declaration of Independence. Thus, the famous case of *Sewall v. Hancock* (in the Court of Vice Admiralty in Boston, 1768) was an in personam action against John Hancock brought by the Advocate General of Massachusetts as an informer (Jonathan Sewall) seeking a penalty three times the value of certain goods

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[13]The provision of the original Judiciary Act respecting exclusive District Court jurisdiction over "all suits for penalties and forfeitures incurred, under the laws of the United States", is presently embodied in 28 U.S.C. §1335 (1970 ed).

Through the process of codification and recodification of the Judicial Code of the United States over the past 200 years, various other parts of the original Section Nine of the first Judiciary Act were disbursed through other parts of the Judicial Code. The Reviser's Note to the 1948 revision of the Judicial Code indicates that the original Judiciary Act provision for the right of jury trial in the District Courts was omitted in 1948 "as covered by Rule 38 of the Federal Rules of Civil Procedure." *See* Legislative History, 1948 Note, 28 U.S.C. §1873, at 7623 (1970 ed).

allegedly unloaded in Boston Harbor from Hancock's sloop *Liberty* without payment of duties. *See* 2 *Legal Papers of John Adams,* 173-210 (Z. L. Wroth & H. B. Zibot eds. 1965) [hereinafter "Adams Papers"].[14] The proceeding was based on the American Act of 1764, 4 Geo. 3, c. 15, §37, which provided, *inter alia,* that "every person who shall be assisting, or otherwise concerned," in unloading of goods without payment of duties "shall for each and every offense forfeit treble the value of such goods . . . ."[15] The statute provided

[14]The editors of Adams Papers tell us (*id.* at 184-85) (footnotes omitted):

> "The trial of Hancock and the others was an event of major political importance in the colonies. Its very length played into the hands of the revolutionary propagandists. From November 1768 until the following summer, "A Journal of the Times," which appeared in a variety of colonial newspapers, carried periodic accounts of the proceedings, interspersed with tart comments on the twin themes of the venality of the Customs Commissioners and the arbitrary injustice of the Court of Admiralty. These attacks helped to establish the Commissioners as obnoxious at the very beginning of their tenure. Their effectiveness was permanently damaged and they served until the Revolution in an atmosphere of constant hostility.
>
> "The attack on the Admiralty Court was buttressed by a portion of Adams' draft argument in the case, which was widely circulated as part of his Instructions to the Boston Representatives of May, 1769. These and other responses to the prosecution of revenue cases brought the Vice Admiralty Courts under the disapprobation of the colonists. The jurisdiction was more and more invoked only in the enforcement of the Acts of Trade, and ordinary civil maritime cases were tried in the common-law courts. A multitude of revenue cases in each port served to stir up local feeling . . . ."

[15]Hancock's sloop *Liberty* was the subject of a separate (and successful) in rem forfeiture proceeding for the same transaction (*see id.* at 177-80) under the same statute (*id.* at 195-96).

for an in personam civil penalty proceeding in the Admiralty Court "precisely because forfeitures alone were not sufficient to deter violators." (Adams Papers at 187).

The statute made provision for trial at common law or in admiralty "because it was a truism that no jury could be found to convict for violations of the Acts of Trade" (*id.* at 188) (footnotes omitted):[16]

> "The statute provided the choice of proceeding at common law or in Admiralty, because it was a truism that no jury could be found to convict for violation of the Acts of Trade. After the recent failure to indict the *Liberty* rioters, the Commissioners can hardly be blamed for accepting truism as truth and exercising the option to proceed in Admiralty. Since the trial was in Admiralty, it was by information, not indictment; it was before a judge sitting without a jury; and the whole range of civil law procedure followed in the High Court of Admiralty in England was invoked – interrogatories, irregular sessions, secret examination of witnesses, and the rest. Whether these procedures were 'illegal' depended not on their inherent qualities but upon the power of Parliament to place violations of the statute within the Admiralty jurisdiction. There was much dispute on this point, and it is not surprising that the Commissioners upheld the parliamentary side of a constitutional question which was resolved only by the Revolution."

[16]As this Court noted in *C. J. Hendry Co. v. Moore,* 318 U.S. 133, 141 (1943) "The rise of the vice-admiralty courts [was] prompted in part by the Crown's desire to have access to a forum not controlled by the obstinate resistance of American juries . . . ."

As John Adams viewed the matter in his draft of his argument for the Court and his "Instructions of the Town of Boston to their Representatives" (*id.* at 199 n. 93),[17] one of the especially obnoxious features of this "American Act" was that the English Parliament had allowed non-jury proceedings for penalties and fines (*id.* at 199-200) (emphasis in original, footnotes omitted):

> "2. The Legislative Authority by which it was made is not only grievous, but the Executive Courts by which it is to be carried into effect is another. In the 41st section of this Act 4 G. 3, c.15, we find that "All the Forfeitures and Penalties inflicted by this or any other Act [*or Acts*] of Parliament, relating to the Trade and Revenues of the said British Colonies or Plantations in America, which shall be incurred there, shall and may be prosecuted, sued for, and recovered, in any Court of Record, or *in any Court of Admiralty*, in the said Colonies or Plantations where such offence shall be committed, or in any Court of Vice Admiralty which may or shall be appointed over all America, (which Court of Admiralty or Vice Admiralty, are hereby

[17]When Hancock's sloop Liberty was originally seized, Boston was in an uproar, and a series of town meetings developed which led to the formation of a town committee including John Adams (Adams Papers at 176). Adams drew up a set of "instructions" for the representatives of the committee (*id.*).

Adams never got to give his "draft" argument in court because Sewall eventually withdrew his action on behalf of the Crown against Hancock. *Id.* at 183. *But see id.* at 192:

> ". . . [H]e used his arguments on the right to a jury trial almost verbatim in his Instructions to the Boston Representatives in May 1769. This document was carried in the newspapers as well as in a 'Journal of the Times', and so played a political role."

> respectively authorized and required to proceed, hear, and determine *extraordinary* Penalties and Forfeitures, are to be heard and try'd – *how*? Not by a Jury, not by the Law of the Land, [but] by the civil Law and a Single Judge. Unlike the Ancient Barons who una Voce responderunt, Nolumus Leges Angliae mutari, The Barons of modern Times have answered that they are willing, that the Laws of England should be changed, at least with Regard to all America, in the most tender Point, the most fundamental Principle. And this Hardship is the more severe as we see in the same Page of the Statute and the very preceeding section § 40, That all Penalties and Forfeitures, herein before mentioned, which shall be incurred in Great Britain, shall [*and may*] be prosecuted, sued for and recovered in any of his Majestys Courts of Record in Westminster or in the Court of Exchequer in Scotland respectively.'
>
> "Here is the Contrast that stares us in the Face! The Parliament in one Clause guarding the People of the Realm, and securing to them the Benefit of a Tryal by the Law of the Land, and by the next Clause, depriving all Americans of that Priviledge. What shall we say to this Distinction? Is there not in this Clause, a Brand of Infamy, of Degradation, and Disgrace, fixed upon every American? Is he not degraded below the Rank of an Englishman? Is it not directly, a Repeal of Magna Charta, as far as America is concerned? It is not att all surprising that the Tryals of Forfeiture and Penalties are confined to the Courts of Record at Westminster, in England. The Wonder only is that they are not confined to Courts of common Law here."

The Seventh Amendment issue posed in this case – *i.e.*, whether Congress may eliminate the usual jury right in a civil penalty proceeding by substituting an

administrative law judge for a United States District judge – has a specific historical analogue in the pre-Revolutionary constitutional debate posed by the American Act of 1764 (Adams Papers at 188 n. 64):

> "One basic issue was the power of Parliament to pass such legislation without colonial representation. See JA's Argument, text following note 89 below. The colonial position, which had at first been that there should be no taxation without representation, gradually broadened after 1765 into a denial of all parliamentary power over the colonies; moreover, the remedy sought became not representation in Parliament, but colonial home rule. Needless to say, the orthodox English view was opposed to the colonial stand. Miller, *Origins of the American Revolution* 225-231. Equally critical was the question of the power of Parliament, however constituted, to interfere with what the colonists claimed as fundamental rights. In his argument for Hancock, JA urged that trial in Admiralty was an interference with the right of trial by jury, and others argued, if he did not, that such statutes were void. See text at notes 92-104. The English position was that Parliament could not be controlled in this regard. No. 44, notes 32-34."

The case of *Sewall v. Hancock* crystalized that constitutional debate, and the omission of a civil jury guarantee from the original Constitutional Convention led to its renewal and ultimate resolution in the simultaneous enactment of the Seventh Amendment and the Federal Judiciary Act of 1789, specifically

preserving the right to trial by jury in civil penalty and forfeiture actions.[18]

[18] The editors of Adams Papers observe (*id.* at 185):

> ". . . *Sewall v. Hancock* helped to unite this feeling [against the jurisdiction of the Vice Admiralty Courts in enforcing the Acts of Trade] and to produce the single impulse against the courts which increased steadily until its manifestation in the Declaration of Independence."

The Declaration of Independence enumerates among the sins of the English Crown that

> "he has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:
>
> * * * * * *
>
> "For depriving us in many cases, of the benefits of Trial by Jury . . . ."

Compare this Court's treatment in *Berger v. New York*, 388 U.S. 41, 58 (1967) of *Entick v. Carrington*, 19 How. St. Tr. 1029, in giving analytical content to the language of the Fourth Amendment.

In *Capital Traction Co. v. Hof, supra*, 174 U.S. at 6, this Court also observed:

> "II. The first Continental Congress, in the Declaration of Rights adopted October 14, 1774, unanimously resolved that 'the respective Colonies are entitled to the common Law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." 1 Journals of Congress, 28.
>
> "The Ordinance of 1787, declared that the inhabitants of the Northwest Territory should 'always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury', 'and of judicial proceedings according to the course of the common law.' 1 Charters and Constitution, 431."

B. A Civil Penalty Proceeding is in Any Event a "Suit at Common Law" Within the Meaning of the Seventh Amendment.

In *Parsons v. Bedford*, 28 U.S. [3 Pet.] 433, 446 (1830), *quoted with approval* in *Ross v. Bernhard*, 396 U.S. 531, 533 (1970) and *Curtis v. Loether*, 415 U.S. 189, 193 (1974), this Court defined the term "common law" as used in the Seventh Amendment as follows (emphasis added):[19]

> "The phrase 'common law', found in this clause, is used in contradistinction to equity, and admiralty and maritime jurisprudence. The Constitution had declared in the third article, 'that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under this authority,' etc. and to all cases of admiralty and maritime jurisdiction. It is well known that in civil causes, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is that this distinction was present to the minds of the framers of the amendment. By common law they meant what the Constitution

[19]The Seventh Amendment states:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States than according to the rules of the common law."

> denominated in the third article 'law'; not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were administered; or where, as in admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit. Probably there were few, if any, States in the Union, in which some new legal remedies differing from the old common law forms were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. *In a just sense, the amendment, then, may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights . . . .*"

And in *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891), *quoted with approval* in *Pernell v. Southall Realty*, 416 U.S. 363, 370 (1974), this Court offered the following definition of an action at law (emphasis added):

> "It would be difficult, and perhaps impossible, to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from an action at law . . . but this may be said, that where an action is simply for the recovery and possession of specific real or personal property, *or for the recovery of a money judgment*, the action is one at law."

And in *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935) this Court, after quoting the Seventh Amendment, observed:

> "The right of trial by jury thus preserved is the right which existed under the English common law when the amendment was adopted. The amendment not only preserves that right but discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of reexamination existing under the common law . . . ."

See also Capitol Traction Co. v. Hof, 174 U.S. 1, 7-8 (1899).

Under English common law, at the time of the adoption of the Seventh Amendment, a "civil" proceeding brought by the government seeking a penalty for violation of a "penal" statute protecting a public interest would be tried in a common law court with a right to trial by jury.

Thus one contemporary treatise on "penal statutes" first defines the concept as encompassing "an Act of Parliament which orders or prohibits the doing of anything under a certain penalty." I Espinasse, A Treatise on the Law of Action on Penal Statutes 5 (1813) [hereinafter cited as "Espinasse"], and then tenders the following breakdown within the concept (*id.* at 6):

> "Some of these Statutes give penalties for breach of a public duty; others are as a compensation for private wrong: In some, the penalty is expressly given, and the person designated who shall sue for the same: In others the penalty is given but there is no express appropriation of it, nor is the person pointed out

> who is to sue for its recovery: In some, the mode of enforcing payment of the Penalty is omitted, in others the distribution: And some Penal Statutes are confined to one mode of proceeding, in others to several. These require distinct considerations."

Regarding "penal statutes . . . *which are of a public nature*, and give a penalty generally or a breach of them, but *without appropriating it to any purpose, person or persons whatever*" (*id.* at 8) (emphasis in original) the treatise observes (*id.*) *citing Rex v. Malland*, 93 Eng. Rep. 877 (K.B. 1728):[20]

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[20]The report of *Rex v. Malland*, 93 Eng. Rep. 877 (K.B. 1728) reads (citations omitted):

"Where there is no appropriation of a statute penalty, it is a debt to the Crown, and suable for in a Court of Revenue, and not by indictment. Fitz 47. 2 Sess. Ca. p. 12, No. 19. 1 Barn. B. R. 108, S.C.

"Indictment on the statute of the late King, 12 Geo. 1, c. 35, for burning place bricks and stock bricks together. And on demurrer it was objected by Mr. Fazakerley, that in this particular instance, though a penalty of 20s. per thousand is given, yet there is no appropriation of it, or any method prescribed in which it shall be recovered, though there is as to all the rest. And upon looking into the Act, it appeared this offence was omitted out of the clause, which gave the Bricklayers Company power to sue for the penalties; and therefore the Court held, that the 20s. per thousand was in the nature of a debt to the Crown, where the unappropriated penalty woudl go, and was suable for in a Court of Revenue, and not by indictment. Though Strange cited 1 Mod. 34. 1 Vent. 63, and insisted, that the 20s. ought to be the measure of the fine upon the indictment (1). Judicium pro def.' "

> "With respect to these the rule is, 'That where a penalty is so given, and there is no appropriation of it to any person or for any purpose; it is a debt due to the Crown, and recoverable in the Court of Exchequer, by which mode only it should seem that the penalty can be enforced.'"

The Court of Exchequer by the time of the adoption of the Seventh Amendment (and, indeed, well before), was a revenue court trying cases brought by the King to collect his debts in which there was a right to trial by jury in such actions. *See Damsky v. Zavatt*, 289 F.2d 46, 49-50 (2d Cir. 1961); Plucknett, *A Concise History of the Common Law* (5th ed.) at 159-60.

Moreover, by the time of the adoption of the Seventh Amendment (and well before) penal statutes embracing a public interest but allowing proceedings to be brought by private persons as informers [*i.e., Qui tam* proceedings, *see* Espinasse, *supra*, at 6] were also actions triable to juries.

Thus, in 1624 Parliament enacted "an Act for the ease of the Subject," concerning "Information Upon Penal Statutes," 21 James I, c. 4, which was a fundamental reform in *qui tam* proceedings aimed at a pattern of abuses which had developed by virtue of reliance on informers. *See generally* 1 W. Holdsworth, *A History of English Law* 355-360. The statute covers "all offences hereafter to be committed against any Penal Statute, for which any common Informer or Promoter may lawfully ground any popular Action, Bill, Plaint, Suit, or Information, before Justices of Assize, Justices of Nisi prius, or Gaol-delivery, Justices of Oyer and Terminer, or Justices of Peace in their General or Quarter Sessions," and provides, *inter alia*, that "the

like Process upon every popular Action, Bill, Information, or Suit . . . be had and awarded, to all Intents and Purposes, as in an Action of Trespass, Vi & Armis, at the Common Law; . . ." (21 James I, c. 4, §1). Sections II and IV of the Act then make reference to "Evidence to the Jury that shall try such Issue," and "Evidence to the Jury that shall try the same" respectively. The statute, incidentally, was aimed at reforming prior practice which had permitted the trial of such actions in "his Majesty's Courts at Westminster" (Section I) regardless of the County where the alleged violation of the Penal Statute occurred.

Thus, regardless of whether the "Public Concern" (Espinasse, *supra*, at 6) embodied in a "penal" statute was vindicated by a proceeding brought by the government or by a *qui tam* action brought on behalf of the government, the proceeding seeking the penalty was a classic common law action carrying a right to trial by jury. *See also* the Report of *Roe v. Roe* in Hardres Reports of Cases in the Court of Exchequer 285 (1792) (emphasis added):

> "*Roe versus Roe.*
>
> "In an information at the suit of *Cross, tam quam* for selling and importing to be sold foreign woollen, *contra formam statuti*, and issue thereupon; it was said by the court, that it is not material upon the trial, whether the forfeiture, or any part of it be given to the informer or not; for that is matter of law and not matter of fact, and may properly be alleged in arrest of judgment; *for the substance of the issue and matter of fact to be tried by the jury is*, whether such cloth was imported to be sold; and if there be no law to prohibit it, or if there be, and that law gives the informer no part of the forfeiture; this is matter of

law, which the court is to determine, [illegible]ute, if any be, being a general law, otherwise [illegible] were a particular law.

"And afterwards judgment was given for the king only, because no act of parliament gives the informer a share."

Finally, it is worth noting that at least as early as 1775, the concept of a "civil" (as opposed to "criminal") proceeding to vindicate the public interest in a civil penal statute was recognized at common law in England. See Lord Mansfield's decision in *Atcheson v. Everitt*, 98 Eng. Rep. 1142, 1147-48 (K.B. 1775).

The federal courts have consistently recognized that a civil action brought by the United States Government seeking, on grounds of violation of a federal statute, a monetary penalty or a forfeiture of property seized on land, is a "suit at common law" within the meaning of the Seventh Amendment jury right.

First, with reference to monetary civil penalties, as the Second Circuit observed in *United States v. J.B. Williams Co.*, 498 F.2d 414, 422-23 (2d Cir. 1974):

> "There can be no doubt that in general 'there is a right of jury trial when the United States sues . . . to collect a penalty, even though the statute is silent on the right of jury trial.' 5 Moore, Federal Practice ¶ 38.-31[1], at 232-33 (1971 ed.). The leading case supporting this proposition is Hepner v. United States [231 U.S. 103] 115, where the Court had no difficulty in concluding that in an action to collect a $1,000 penalty assessed for a violation of the Alien Immigration Act '[t]he defendant was, of course, entitled to have a jury summoned.' See also United States v. Regan [232 U.S. 37], 43-44, 47."

See Rogers v. Loether, 467 F.2d 1110, 1120 nn.33 & 37 (5th Cir. 1972) *aff'd. sub nom. Curtis v. Loether, supra, discussing Porter v. Warner Holding Co.*, 328 U.S. 395, 401-02 (1946); *Damsky v. Zavatt*, 289 F.2d 46, 48 (2d Cir. 1961); *Connolly v. United States*, 149 F.2d 666 (9th Cir. 1945); *United States v. Jepson*, 90 F.Supp. 983 (D.N.J. 1950). *See generally* 5 J. Moore, Federal Practice, ¶38.31[1], at 232-33 (1971 ed.). *See also United States v. Wonson*, 1 Gall. 4-5, 14, 20 (Circuit Ct. 1812) (Story, J.) *discussed in Capitol Traction Co. v. Hof*, 174 U.S. 1, 8 (1893).[21]

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[21] The *Wonson* opinion was authored by Mr. Justice Story on Circuit in 1812 (who also wrote *Parsons v. Bedford, supra*, and whose Commentaries on the Constitution of the United States have been recognized as "a primary source" on the Constitution's meaning. See Professor Sutherland's Introduction, J. Story, 1 Commentaries on the Constitution of the United States, p. x (1968 ed.). This Court has recognized the *Wonson* case as significant authority on the Seventh Amendment. *See* Slocum v. United States, 228 U.S. 364, 377 (1913).

The *Wonson* case was an "action [for] debt for a penalty incurred under the 3rd section of the embargo supplementary Act, Jan. 9, 1808, ch. 3" brought in federal District Court by the government. 1. Gall. at 4. The defendant won a verdict below and the United States filed an appeal to the Circuit Court, thereby raising two questions (1 Gall. at 5) (emphasis added):

> "1. Whether this action, ***being a common law suit***, can be brought before this Court by appeal, or ought not to be by writ of error. 2. Supposing the action rightly before the Court, whether the facts are again to be submitted to a jury in this Court, or the appeal submits questions of law only for the consideration of the Court."

The government relied on the Act of March 3, 1803, ch. 93, s. 2, on both issues, but the Court rejected the government's construction of the Act, because, as to the second issue, the Act so construed would be void under the Seventh Amendment's prohibition against reexamination by an appellate court of facts

(Footnote continued on next page)

Second, with reference to "forfeiture of articles seized on land for violation of federal statutes," this Court in *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 153 (1943) summarized the law as follows:

> "The Court has never held or said that the admiralty jurisdiction in a forfeiture case is exclusive, and it has repeatedly declared that, in cases of forfeiture of articles seized on land for violation of federal statutes, the district courts proceed as courts of common law according to the course of the Exchequer on informations *in rem* with the trial by jury. *The Sarah*, 8 Wheat 391, 396 n. A; *443 Cans of Frozen Egg Product v. United States*, 226 U.S. 172, and cases cited. In *United States v. 422 Casks of Wine*, 1 Pet. 547, Justice Story defined such an action as a libel or information *in rem* on the Exchequer side of the court. And see Chief Justice Marshall's reference in *Schooner Hoppett v. United States*, 7 Cranch 389, 393, to 'proceedings in Courts of common law, either against the person or the thing, for penalties or forfeitures.' In all this we perceive a common understanding of judges, lawyers, and text writers, both before and after the adoption of the Constitution, of the common law nature of the procedure and judgment *in rem* in forfeiture cases,

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(Footnote 21 continued from preceeding page)
once tried by a jury in a common law action. 1. Gall. at 11, 18-21. Justice Story then added the following post-decision memorandum (1 Gall. at 21):

> "Memorandum. There were a great number of causes on the docket standing on the same ground, and as the District Attorney ultimately expressed himself satisfied with the opinion of the Court, and declined to have a re-examination at the Supreme Court, the Circuit Court ordered this cause, as well as all the others, to be dismissed for want of jurisdiction."

> and of its use in such proceedings in the Exchequer and in the American common law courts."

See also United States v. Winchester, 99 U.S. 372, 374 (1878); *United States v. $5,372.85 United States Coin & Currency*, 283 F.Supp. 904, 905-06 (S.D.N.Y. 1968); *Vandevander v. United States*, 172 F.2d 100, 101 (5th Cir. 1949) ("Although a libel of information is used to prosecute a seizure for condemnation on land, it is a common law case in which a jury trial is a constitutional right."); *One Plymouth Automobile v. United States*, 165 F.2d 186, 187 (5th Cir. 1948) ("[i]n common law cases involving over $20, a jury trial is a constitutional right; and from the beginning it has been established that, though all seizures for forfeitures are to be prosecuted by libel *in rem* according to admiralty practice, seizures on land are not admiralty cases but *common law informations*, in which a jury trial is demandable") (emphasis in original). *See generally* 5 J. Moore, Federal Practice, ¶38.12[1] at 128.24 (1971 ed.).

Finally, an administrative adjudication for an OSHA civil penalty results strictly in liability for a money judgment, on which the Government may levy execution like any other money judgment recovered in a suit at law. *See Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891) *quoted with approval* in *Pernell v. Southall Realty, supra*, 416 U.S. at 363, 370 (1974). As Judge Gibbons' extensive analysis in his panel dissent in the *Irey* case below demonstrates, "... [N]o case in the Supreme Court has ever sustained the imposition of an *in personam* judgment for a civil penalty in a

proceeding in which the defendant claimed and was denied the right of jury trial guaranteed by the Seventh Amendment." (Irey Cert. App. at 24b).[22]

C. The Seventh Amendment Applies to Administrative Monetary Penalty Adjudications.

1. The Rulings of the Lower Courts

Thus, if Congress had, in the OSHA scheme, provided for initial enforcement proceedings for OSHA's monetary penalties in the United States District Court rather than an administrative forum (or alternatively, allowed *de novo* judicial review after the administrative proceeding) it is incontestable that the defendant would have a right to a jury trial under the Seventh Amendment. The sole basis for exempting the OSHA civil penalty from the "traditional accoutrement [of] the right to a jury trial of fairly disputed issues of fact" which accompanies the "historic remedy of a civil penalty for [statutory] violations . . . ." *United States v. J. B. Williams, supra,* 498 F.2d at 426, is that this time

[22]The panel majority in *Irey* relied, *inter alia,* on *Oceanic Steam Navigation Co. v. Stranahan,* 214 U.S. 320 (1909) and *Hepner v. United States,* 213 U.S. 103 (1909). *See* Irey Cert. App. at 7b; 8b n. 11. These cases are distinguished by Judge Gibbons at Irey Cert. App. 18b-24b. We note in addition to Judge Gibbons' analysis that both cases rest on the extraordinary and special congressional powers involved in revenue collection and immigration. *Cf.* Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973) (Powell, J., concurring); Curtis v. Loether, *supra,* 415 U.S. at 198 n. 15.

Congress departed from its prior almost uniform legislative policy of respecting the established Seventh Amendment jury right (*see* pp. 83-84 *infra*) and chose instead to place the initial enforcement proceeding in a federal administrative forum with limited judicial review.

As the Court in *Rogers v. Loether, supra,* 467 F.2d at 116 n. 19 observed, *quoting from Minneapolis & St. L.R.R. v. Bombolis,* 241 U.S. 211, 219 (1916) "The Seventh Amendment is controlling upon Congress." The issue, then, which this Court must resolve in the instant cases, is whether Congress may – consistent with the Seventh Amendment – eliminate a constitutionally protected civil jury trial right in civil penalty cases simply by substituting an administrative tribunal for a United States District Court in a particular civil penalty proceeding.

The Third Circuit's *en banc* majority opinion in the *Irey* case, relying principally on *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937) resolved this issue in favor of the government by holding squarely and unequivocally that the Seventh Amendment is generally not applicable to administrative proceedings (Irey Cert. App. at 4a):

> "[I]f the proceeding is before an administrative agency rather than in the courts, the Supreme Court has held that the Seventh Amendment does not apply."

The whole of the Third Circuit's analysis is set forth in the following passages (*id.* at 8a-9a)

> "Nevertheless, it would seem that reliance upon the claimed equitable coloration of the Occupational Safety and Health Act obscures the simple

fact that this is an administrative adjudication. The Supreme Court's rulings to date leave no doubt that the Seventh Amendment is not applicable, at least in the context of a case such as this one, and that Congress is free to provide an administrative enforcement scheme without the intervention of a jury at any stage.

"The petitioner likens the assessment of these OSHA civil penalties to an *in personam* monetary judgment which can be obtained only in an action at law. But that similarity has not proved decisive to the Supreme Court. *Curtis v. Loether, supra,* at 196. We see no difference in the impact on an employer between an administrative award which requires him to pay a fixed sum of money to certain employees as in the *Jones & Laughlin* case and one which orders payment of a civil penalty to the United States.

"Our function is not to pass upon either the wisdom or desirability of such an administrative adjudicatory process. We are limited to deciding whether it is constitutional within the limitations set by the Supreme Court.[9]

> "There is a line beyond which Congress may not transfer traditional remedies from the courts to administrative agencies so as to evade the protection of the Seventh Amendment.[10] As so often with constitutional adjudications, such a point need not be defined with precision to cover all cases for all time. We only decide the case before us, and, as the panel previously held, that line has not been crossed in this case. . . ."

The Fifth Circuit's reasoning on the Seventh Amendment claim in the *Atlas* case below is essentially the same as the Third Circuit's (Atlas Cert. App. at 25a):

"Failing the Sixth Amendment and Article III hurdle, Atlas further argues that even if the penalties are termed civil, the Seventh Amendment requires that Congress provide a system of enforcement that gives employers the opportunity to put their case before a jury in a de novo proceeding in the District Court.[56] As support, Atlas cites *United States v. J.B. Williams Co.*[57] in which the Second Circuit held that a defendant had the right to a trial by jury in an action brought by the Attorney General in the District Court under 15 U.S.C.A. §56 for violations of an F.T.C. cease-and-desist order, and the dissenting opinion of Judge Gibbons in *Frank Irey, Jr., Inc. v. OSHA, supra. Williams,* however, is readily distinguishable for there the only means of statutory enforcement was by way of the federal courts. Where adjudicative responsibility rests only in the administering agency, 'jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the [agency's] role in the statutory scheme.' *Curtis v. Loether,* 1974, 415 U.S. 189; see also *Pernell v. Southall Realty,* 416 U.S. 363, 94 (1974). The Second Circuit in *Williams* was cognizant of this distinction and held merely that where the United States brings a traditional civil suit in the District Court juries must be provided.

"That the civil sanction under attack is in the form of a dollar penalty is not a sufficient distinction to deny the power of Congress to prescribe an administrative, as distinguished from a judicial mechanism. To so hold would produce the absurd spectacle of Congress – having the full power to prescribe an administrative structure with sanctions of denial or revocation of a life-or-death license (see the large number of such statutes at note 43, *supra*) – being denied the power to prescribe a money fine of a single dollar or for that matter a single red sou."

The broad sweep of the holdings below[23] is not surprising since established Seventh Amendment case law forecloses every other avenue which might be advanced to justify rejection of the Seventh Amendment claim in these cases. *See* pp. 65-71 *infra*. But, as the four dissenting judges in the *Irey* case below recognized (Irey Cert. App. at 12a-14a) these decisions generate a most fundamental Article III separation of powers issues – *i.e.*, under the Constitution is Congress or this Court the final arbiter of the reach of the Seventh Amendment?

2. The Jones & Laughlin Case.

The principle basis for the position that the Seventh Amendment has no application generally to administrative adjudications is the two paragraphs appearing at the

[23]We note that the logic of the Fifth Circuit's "single red sou" argument is to treat the Seventh Amendment itself as an "absurd spectacle". For that Amendment prohibits Congress from allowing a federal district judge to compel a citizen to submit for his sole determination factual disputes involving twenty dollars or more, while allowing Congress to permit the same judge to compel Standard Oil Company to submit to a federal judicial determination of the question whether or not that huge company may even continue to exist. The point is that whatever legitimate control Congress may have under Article III and the Seventh Amendment over the allocation of functions between federal judges, juries, and administrative law judges must rest on the type of sanction or remedy involved, and not on a comparison of severity of possible remedies in individual cases plucked from different categories or types of remedies. *Cf.* 1 K.C. Davis, Administrative Law Treatise §2.13, at 134 (1958 ed.) ("An agency in revoking a license may exercise a power of life and death over a valuable business, but ordinarily it may not impose a ten-dollar criminal fine.")

end of the Court's opinion in *NLRB v. Jones & Laughlin*, 301 U.S. 1, 48-49 (1937) (Hughes, C.J.) wherein the Court rejected the contention that the Seventh Amendment applies to an NLRB back-pay order (emphasis added):

> "Respondent complains that the Board *not only ordered reinstatement but directed the payment of wages for the time lost by the discharge, less amounts earned by the employee during that period.* This part of the order was also authorized by the Act. §10(c). It is argued that the requirement is equivalent to a money judgment and hence contravenes the Seventh Amendment with respect to trial by jury. The Seventh Amendment provides that 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' The Amendment thus preserves the right which existed under the common law when the Amendment was adopted. *Shields v. Thomas*, 18 How. 253, 262; *In re Wood*, 210 U.S. 246, 258; *Dimick v. Schiedt*, 293 U.S. 474, 476; *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657. *Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. Clark v. Wooster*, 119 U.S. 322, 325; *Pease v. Rathbun-Jones Engineering Co.*, 243 U.S. 273, 279. It does not apply where the proceeding is *not in the nature of a suit at common law. Guthrie National Bank v. Guthrie*, 173 U.S. 528, 537.
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> "*The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding.* Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies

appropriate to its enforcement. The contention under the Seventh Amendment is without merit."

But these portions of the opinion, when read in context and in light of the authorities cited, hold only that the Seventh Amendment does not foreclose a tribunal exercising powers in the nature of equitable remedies from awarding incidental monetary relief, because proceedings before such a tribunal are not in the nature of common law proceedings any more than suits to enforce claims against the sovereign (which depends strictly on a waiver of sovereign immunity) can be considered suits in the nature of a suit at common law.

Thus, the immediately preceding paragraph of this Court's opinion in *Jones & Laughlin* sustains the reinstatement remedy of the NLRB on the reasoning that this remedy is simply a legislative analogue to the judicial equitable remedial power to order "restoration to service" in contempt proceedings for violation of an injunction, 301 U.S. at 47-48 (emphasis added):

> "The order of the Board required the reinstatement of the employees who were found to have been discharged because of their 'union activity' and for the purpose of 'discouraging membership in the union.' That requirement was authorized by the Act, §10 (c). In *Texas & N.O.R. Co. v. Railway Clerks, supra*, a similar order for restoration to service was made by the court in contempt proceedings for the violation of an injunction issued by the court to restrain an interference with the right of employees as guaranteed by the Railway Labor Act of 1926. The requirement of restoration to service, of employees discharged in violation of the provisions of that Act, was thus a sanction imposed in the enforcement of a judicial

> decree. *We do not doubt that Congress could impose a like sanction for the enforcement of its valid regulation. The fact that in the one case it was a judicial sanction, and in the other a legislative one, is not an essential difference in determining its propriety. . . .*"

It is this passage which provides the lead-in for the first sentence of the two paragraphs dealing with the Seventh Amendment issue (emphasis added):

> "Respondent complains that the Board *not only ordered* reinstatement but directed the payment of wages for the time lost by the discharge, less amounts earned by the employee, during that period . . . ."

Having just sustained the Board's reinstatement power as a legislative analogue to judicial equitable remedial powers, the totally dispositive answer to this question is the precise answer the *Jones & Laughlin* Court gave, which was then one of the most familiar, black letter law propositions regarding equitable remedies: *i.e.*, a court in equity may award money damages as

> "an incident to equitable relief even though damages might have been recovered in an action at law. Clark v. Wooster, 119 U.S. 322, 325; Pease v. Rathbun-Jones Engineering Co., 243 U.S. 273, 279."

Since, as the *Jones & Laughlin* Court states in the immediately preceding sentence, the "Seventh Amendment . . . preserves the right which existed under common law when the amendment was adopted" – and since the opinion has just established that the NLRB proceeding is a legislative analogue to a judicial

equitable proceeding – it follows that the Seventh Amendment is not applicable to this award of monetary relief because the NLRB proceeding "is not in the nature of a suit at common law." *Guthrie National Bank v. Guthrie*, 173 U.S. 528, 537 (1899)."

That the opinion up to this point in no way relies on the *nature of the tribunal Congress set up* in the Wagner-Connery Act 49 Stat. 449 *et seq.* is further demonstrated by a reading of *Guthrie National Bank v. Guthrie, supra.* The *Guthrie* case arose on review of a District Court decision invalidating a statute of the territorial legislature of Oklahoma authorizing the territorial District Court to appoint three persons to act "as a commission or referees" (173 U.S. at 530 asterik footnote, section 1 of the statute) to "inquire into an pass upon" (*id*) all claims for indebtedness arising out of actions of the provisional government of the villages of Guthrie which preceded the statutory creation of the City of Guthrie as a permanent municipality. 173 U.S. at 529. The statute directed the "commission or referees" to report their findings on all claims allowed or disallowed" for approval or disapproval of the District Judge." 173 U.S. at 534 asterik footnote, section 4 of the statute. The City Council of Guthrie was then directed to tax each of the four subdivisions to pay the claims allowed by the District Judge in proportion as the claims were derived from actions of that subdivision's provisional government. *Id.*

The statute thus authorized compulsory taxation to pay (173 U.S. at 534):

> "claims against a municipal corporation, which have no legal obligation, and which therefore could not be enforced in a court, but which the legislature thinks have a sufficient equity and are based upon a sufficiently strong moral obligation to make it proper for it to provide for their investigation and for the payment of such as are decided to be proper, by taxation upon the property situated in the city."

As the *Guthrie* court stated (173 U.S. at 534) (emphasis added):

> "The important question in this case is whether the territorial legislature by virtue of the grant to it of legislative powers had authority to create this commission and to provide for the payment of claims *of the nature* mentioned in the act."

And the *Guthrie* Court's answer was (173 U.S. at 535-37) (emphasis added):

> "In *United States v. Realty Company*, 163 U.S. 427, 439, the power of Congress to recognize a moral obligation on the part of the nation and to pay claims which, *while they were not of a legal character, were nevertheless meritorious and equitable in their nature*, was affirmed. The territorial legislature at least had the same authority as that possessed by Congress to recognize claims *of the nature* described. It is a legislative power, and it was granted to the territorial legislature by the acts already referred to. A city is a municipal corporation and a political subdivision of the State, and what the State could do itself it has the power to direct its agent, the municipality, to do.
>
> * * * *
>
> ". . . . In the exercise of this jurisdiction over municipal corporations by the state or by the territorial legislature, no constitutional principle is violated. It is a jurisdiction which has been customarily exercised ever since the foundation of

the government, and is based upon the power of the State as sovereign to itself recognize or compel any of its political subdivisions to recognize those obligations which, *while not cognizable in any court of law* are yet based upon considerations so thoroughly equitable and moral as to deserve and compel legislative recognition."

This holding on the major issue in the case is then immediately followed by the *Guthrie* Court's rejection (in language strikingly parallel to the *Jones & Laughlin* opinion) of the City of Guthrie's claim that its Seventh Amendment rights were violated by the statute (173 U.S. at 537-38) (emphasis added):

"There is no force to the objection that in ascertaining the facts provision must be made for a trial by jury, if demanded, or else that the Seventh Amendment to the Constitution of the United States is violated, which provides that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.'

"This Act does not infringe upon that amendment. *The proceeding under it is not in the nature of a suit at common law and the cases already cited show the power of the legislature to provide for payment by taxation of claims of the nature of those involved herein.*"

The holding of *Guthrie*, then, on the Seventh Amendment issue, was that a claim against the sovereign was not in the nature of a suit at common law within the meaning of the Seventh Amendment, another familiar black-letter law proposition of this Court's Seventh Amendment jurisprudence. *McElrath v. United States*, 102 U.S. 426, 440 (1880). *See also Galloway v. United States*, 319 U.S. 372, 388 (1943). That holding,

as the plurality opinion in *Glidden v. Zdanok*, 370 U.S. 530, 572 (1962) states, in no way turns upon the "legislative" or "statutory" nature of the tribunal (emphasis added):

"A preliminary consideration that need not detain us long is the absence of provision for jury trial of counterclaims by the Government in actions before the Court of Claims. Despite dictum to the contrary in *United States v. Sherwood*, 312 U.S. 584, 587, *the legitimacy of that nonjury mode of trial does not depend upon the supposed 'legislative' character of the court. It derives instead, as indeed was also noted in Sherwood, ibid., from the fact that suits against the Government, requiring as they do a legislative waiver of immunity, are not 'suits at common law' within the meaning of the Seventh Amendment. McElrath v. United States*, 102 U.S. 426, 439-440. The Congress was not, therefore, required to provide jury trials for plaintiffs suing in the Court of Claims; the reasonableness of its later decision to obviate the need for multiple litigation precludes a finding that its imposition of amenability to nonjury set-offs was an unconstitutional condition. *Cf., Minneapolis & St. L.R. Co. v. Bombolis*, 241 U.S. 211; *see* 74 Harv. L. Rev. 414, 415 (1960)."

See also H. Hart & H. Wechsler, *The Federal Courts and the Federal System* 399-400 (2d. ed. 1973).[24]

The *Jones & Laughlin* opinion, then, up to the end of the first paragraph dealing with the Seventh Amendment issue, in no way relies on the administrative nature of the tribunal as a basis for rejecting the Seventh Amendment claim. The second paragraph then states (emphasis added):

> "The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit."

[24]That the *Guthrie* Court's holding in no part rested on the nature of the tribunal (*i.e.*, "commission or referees") but rather exclusively on the nature of the claims is also shown by the Court's rulings: (1) that even if the Act allowed *no* judicial investigation whatsoever it would be constitutional (173 U.S. at 538); (2) the Act in no way regulates "the practice in courts of justice" because the claims rest only on moral obligations (173 U.S. at 534); (3) in any event the Act does allow the District Court "to investigate for itself the facts upon which the claims were founded" (173 U.S. at 538) and "these facts may be found by the court without a jury" (173 U.S. at 539). As the *Guthrie* court well knew, the Seventh Amendment applied to the territorial courts, *Webster v. Reid*, 52 U.S. [11 How.] 437, 460 (1851); *Kennon v. Gilmer*, 131 U.S. 22, 28 (1889), despite the fact that these were then viewed as "legislative courts" incapable of receiving Article III judicial powers. *American Insurance Co. v. Canter*, 26 U.S. [1 Pet.] 511, 546; *Glidden v. Zdanok*, *supra*, 370 U.S. at 544-45. *See also Minneapolis & St. L. R.R. v. Bombolis*, 241 U.S. 211, 219 (1911).

Practically the whole basis for the third circuit *en banc* majority's reading of *Jones & Laughlin* (and thus its holding below) turns on this paragraph and particularly on the two words "statutory proceeding." But the Court could not conceivably have meant in any sense to broaden the meaning of the first paragraph to rest the disposition as well on the administrative nature of the tribunal.

First, the critical portion of the disjunctive in the first sentence of this second paragraph – *i.e.*, "or in the nature of such a suit" carries directly over from the *Guthrie* citation and as such, obviously goes no further in content than *Guthrie* itself.

Second, the context of the entire opinion shows that the phrase "statutory proceeding" is surely intended to restate for clarification the legislative-judicial equity analogue which forms the essential basis for the entire holding. Thus: (a) in the discussion of the NLRB's reinstatement power the Court squarely rejects a "legislative-judicial" distinction based on the nature of the tribunal ("the fact that in the one case it was a judicial sanction, and on the other a legislative one, is not an essential difference in determining its propriety," *see* pp. 48-49 *supra*); (b) no mention in the entire Seventh Amendment discussion is made of the NLRB as an "administrative agency" despite that choice of characterization earlier in the opinion with respect to the constitutionality of the NLRB's procedures (301 U.S. at 48); and therefore (c) the most natural interpretation of the term "statutory proceeding" in total context is simply to reiterate the "legislative" equitable remedy analogue as the basis for asserting that

"the proceeding is one unknown to the common law."[25]

We believe the foregoing discussion demonstrates – even without appeal to the broader questions of constitutional policy underpinning the Seventh Amendment and Article III of the Constitution – that the *Jones & Laughlin* opinion simply cannot be read as standing for the general proposition that the Seventh Amendment has no applicability to administrative adjudications. But far more fundamental for the disposition of this case are the implications of the lower courts' rationale for the role of the federal courts in the American system of constitutional government as that role is related to the Seventh Amendment. As the *en banc* dissent in the *Irey* case pointed out, the critical feature of the holding below is that in effect "Congress can by fiat define the term 'administrative adjudication' and thereby necessarily define the Seventh Amendment term 'Suits at common law' . . . ." thus effectively eliminating the federal courts from any meaningful participation in defining the scope of the Seventh Amendment (Irey Cert. App. at 12a-14a) (footnotes omitted):

> " . . . Thus, I assume, as does the common consensus, that the seventh amendment applys to the entire judicial power of the United States to the extent that the exercise of that power involves suits at common law. I also assume, and I do not suppose the majority disagrees, that the seventh amendment binds the entire federal government,

[25]We note that there isn't a single citation in the second paragraph. If the Court had intended in any sense (holding, alternative holding or dictum) to state a rationale different from the first paragraph (every step of which carries a citation) the Court would not have done so without a single authority.

> not merely the Article III courts. I also assume that Congress could not confer the entire diversity jurisdiction, including suits at common law, upon a non-Article III tribunal sitting without a jury. Nor, I suppose, would the case be different if Congress called those non-Article III adjudicators 'administrators' rather than 'judges.'
>
> "But if the majority is right about this case, then my last two assumptions are dead wrong, for nothing in the majority opinion gives any definition to the term 'administrative adjudications' other than to simply recognize the label which Congress has fastened upon it. Indeed, that is precisely the government's position. When at oral argument the attorney appearing for the government was asked to suggest a standard by which an 'administrative proceeding' falling outside the reach of the seventh amendment could be identified, the only standard he could suggest was the label Congress attached. The majority opinion although it gives passing lip service to the principle of judicial review, embraces this position by totally omitting any attempt to give content either to the seventh amendment term 'Suits at common law' or to its term 'administrative adjudication.' The extent of its analysis is in three sentences:
>
> > 'There is a line beyond which Congress may not transfer remedies from the courts to administrative agencies so as to evade the protection of the Seventh Amendment. As so often with constitutional adjudications, such a point need not be defined with precision to cover all cases for all time. We only decide the case before us, and, as the panel previously held, that line has not been crossed in this case.'
> >
> > (Majority opinion at 10) (footnote omitted).
>
> "But how do we know the line has not been crossed if we are not told where it is? What

neutral principle was brought to bear in deciding that this case fell on the permissible side of the invisible line? There is only one discernible to me in the majority's opinion – that urged by the government. The line is wherever Congress says it is.

"If this is the teaching of the one authority upon which the majority relies, then unbeknownst to the world of legal scholarship, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), affected the most profound and enormous redistribution of power among the three branches of the federal government of any case in the Court's history. I had thought until today that the Court, not Congress, was the final arbiter of the lines drawn in the Constitution. But if Congress can by fiat define the term 'administrative adjudication' and thereby necessarily define the seventh amendment term 'Suits at common law', what role do the Article III courts play? I have already referred to the possibility of administrative diversity cases. Can Congress, acting under its commerce clause powers refer all contract cases affecting interstate commerce to an 'administrative' non-jury adjudicator? And in a sixth amendment context, can Congress 'decriminalize' a whole range of conduct and refer enforcement of federal policies to an administrative civil commitment agency? Think of the judicial resources that would have been saved had that approach been taken during the Vietnam War with respect to the Selective Service Act. It is true, of course, that in either a sixth or a seventh amendment context, the elimination of a jury trial would still leave operable the due process protection of the fifth amendment. Thus some form of judicial review would remain. But my point is that whether we are dealing with the sixth amendment guaranty of a jury trial 'in all criminal

prosecutions', or with the seventh amendment guaranty of a jury trial '[i]n Suits at common law,' the constitutional scheme of things requires that the Court, not Congress, give meaning to the constitutional terms, and thereby define the limits of administrative proceedings."

The failure of the Third Circuit *en banc* majority to articulate a "line" – in the sense of principled basis for its reading of *Jones & Laughlin* which suggests the limits as well as the reach of its holding – highlights the fundamental danger of reading that case "for all it might be worth rather than the least it has to be worth. . . ." *Cf.* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1364 (1953). In the face of such a holding there is no "functional" approach whereby this Court can in the future restrict Congress's exercise of its putative legislative discretion to bypass the Seventh Amendment by shifting some or all of the business of the federal judiciary to administrative adjudicators. For example, is there any formulation of the type of policy arguments that might be tendered by the government in justification for the OSHA non-jury administrative adjudicator which would not also be applicable practically ipso facto (if not a fortiori) to every single governmental civil penalty action presently carrying a Seventh Amendment right to trial by jury? Moreover, is there any significant subcategory of cases presently arising under the federal question jurisdiction (28 U.S.C. §1331) as to which a similar set of legislative policy justifications might not be tendered under the sort of standard this Court frequently applies to test the empirical rationality of a congressional statement of

purposes in the face of a constitutional challenge to the validity of a statute?[26]

[26]In addition to the substantive categories of cases listed in *Curtis v. Loether*, *supra*, 415 U.S. at 193-94, consider the constitutionality under a functional approach of an amendment to 28 U.S.C. §1331 that would place all federal question cases where the amount in controversy is between $10,000 and $100,000 in the hands of non-jury administrative adjudicators. Would such a statute – if presaged by congressional findings relating to crowded dockets, speed of remedy, etc. – be demonstrably irrational under, for example, the judicial review standard for testing the reach of Congress's power to regulate interstate commerce? *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253-58 (1964).

Nor are we dealing with mere academic "hypothetical horribles" here. As the Fifth Circuit in the *Atlas* case observed (Atlas Cert. App. at 6a) (emphasis in original):

> ". . . [t]he streamlined enforcement procedure embodied in OSHA, although presently prescribed in only a few instances, has been recommended as a blueprint for a major revision of the enforcement systems of all federal agencies."

See Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (1972) 900-01, cited at footnote 11 of the Fifth Circuit's *Atlas* opinion and discussed herein at pp. 83-84 *infra*.

Of course we do not concede that the applicable judicial standard on such a functional approach would be the "rational relation" test. Indeed, considering that we are dealing with a federal statute encroaching on a specific constitutional policy interest embodied in an Amendment intended to check the majoritarian will as expressed in Congress, it would be necessary on any functional theory to apply a strict scrutiny-type standard to test the empirical basis of such statutes. *See generally* Dandridge v. Williams, 397 U.S. 471, 484-85 (1970). *See also* pp. 73-74 *infra*.

We note that here the Court is dealing with "the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure," *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935) *quoted with approval* in *Colgrove v. Battin*, *supra*, 413 U.S. at 156. Thus, the problem is not merely a "line drawing" problem of stating "with precision to cover for all time" a "point" "beyond which Congress may not transfer remedies from the courts to administrative agencies so as to evade the protection of the Seventh Amendment" "as [is] so often the case with constitutional adjudications." See the *en banc* majority decision in *Irey*, Irey Cert. App. at 9a. Where the issue is congressional discretion over a formal attribute of the common law jury not traceable to a constitutionally-based policy interest or a significant historical policy embodied in the Seventh Amendment, it may be proper to decline to choose in advance the numerical stopping point the federal courts will impose to avoid falling off the "slippery slope." *See, e.g., Williams v. Florida*, 399 U.S. 78, 91 n. 28 (1970). But such a judicial approach is not transferrable to the very different task of describing meaningful boundaries on Congress's power to transfer Seventh Amendment business to administrative forums.

We submit that if, as this Court recently reaffirmed (*United States v. Nixon*, 418 U.S. 683, 703-05 (1974)) "It is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) that duty cannot be met by a judicial sanction of congressional power generally to redelegate cases otherwise covered by the Seventh Amendment to nonjury administrative

adjudicators where no principled limitation on the congressional power so recognized is set forth.

The *Jones & Laughlin* case, then, does not support the contention that Congress may displace the Seventh Amendment jury right simply by designating an administrative tribunal as the locus of trial for an action which would otherwise be triable to a jury as a matter of constitutional right. Nor do the cases of *Block v. Hirsh*, 256 U.S. 135 (1921), *Curtis v. Loether*, *supra*, or *Pernell v. Southall Realty*, *supra*, justify this conclusion.

Thus, in *Block v. Hirsh*, *supra*, this Court sustained a temporary statute based on an emergency housing shortage resulting from World War I which abolished the substantive legal right of a landlord to throw his tenant out after the expiration of his lease and gave the tenant a legal right to hold over on the terms of either the old lease or new terms specified by a rental commission. 256 U.S. at 153-54. In place of the landlord's former right to regain possession upon expiration of the lease, the statute accorded him a right to possession only for his own or his family's personal occupancy upon thirty days notice. The *Block* Court (in a 5 to 4 decision) sustained the power of Congress to thus displace the substantive rights of landlords to choose their tenants and negotiate their own lease terms as a reasonable police power regulation in light of the housing emergency, noting that "a limit in time, to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change." 256 U.S. at 157. The Court then disposed of the Seventh Amendment contention in the following paragraph (256 U.S. at 158) (emphasis added):

> "The statute is objected to on the further ground that landlords and tenants are deprived by it of a trial by jury on the right to possession of the land. If the power of the commission established by the statute is established, as we think it is, by what we have said, this objection amounts to little. To regulate the relation and to decide the facts affecting it are hardly separable. *While the act is in force there is little to decide except whether the rent allowed is reasonable, and upon that question the courts are given the last word. A part of the exigency is to secure a speedy and summary administration of the law, and we are not prepared to say that the suspension of ordinary remedies was not a reasonable provision of a statute reasonable in its aim and intent . . . .*"

Thus, the *Block* Court's stated rationale for the Seventh Amendment disposition was that (a) the power in the Commission effectively to set the terms and conditions of the leasehold left "little to decide" in a possessary action and, in any event (b) in the emergency conditions addressed by the act "we are not prepared to say that the suspension of ordinary remedies was not a reasonable provision of a statute reasonable in its aim and intent." *Id.* The one thing the *Block* Court did *not* say was that Congress's power to enact a temporary "suspension of ordinary remedies" was dependent on its choice of an administrative forum opposed to a judicial forum for setting the terms of the landlord-tenant relationship in the emergency.

Curtis v. Loether, *supra*, and *Pernell v. Southall Realty*, *supra*, reiterate the established definition of the Seventh Amendment phrase "common law" set forth in this Court's decisions in *Parsons v. Bedford*, *supra*, and

Whitehead v. Shattuck, *supra*,[27] and then hold the Seventh Amendment *is* applicable to, respectively, a damage action under Title VII of the Civil Rights Act of 1968 in the Federal District Court and a suit for possession of land in the Superior Court of the District of Columbia.[28] In the context of these holdings, as the

[27] *See* pp. 32-33 *supra*.

[28] The *Pernell* holding raises another problem with the broad reading of *Jones & Laughlin* in the *Irey* and *Atlas* cases. Thus, the District of Columbia Court Reform and Criminal Procedure Act of 1970, §111, D.C. Code §11-101, establishes that the Superior Court is exclusively an Article I or "legislative" court. See also the definition of "court of the United States" in 28 U.S.C. §451, which "as used in this title" limits the term to "any court created by Act of Congress, the judges of which are entitled to hold office during good behavior", a definition excluding the Superior Court. *See* D.C. Code §11-1502.

Yet the *Pernell* Court unhesitatingly reaffirmed its prior ruling in *Capitol Traction Co. v. Hof*, 174 U.S. 1, 5 (1889) that the Seventh Amendment "like other Provisions of the Bill of Rights . . . is fully applicable to Courts established by Congress in the District of Columbia." *See* Pernell, *supra*, 416 U.S. at 370. That ruling, of course, is perfectly consistent with the Seventh Amendment rule that the Seventh Amendment is applicable to tribunals such as the territorial courts. *See* note 24 *supra*.

But suppose Congress had included in the D.C. Court Reform Act a set of findings to the effect that landlord-tenant relations in the District demanded a speedy, efficient, expert set of adjudicators which, for convenience sake, would be set up as a specialized Division of the Superior Court to be labelled the "Landlord-Tenant Administrative Tribunal Division." Would that provision have led to a different result in the *Pernell* case? If not, then the reason must be because the constitutional "legitimacy of that nonjury mode of trial does not depend on the supposed [administrative or] 'legislative' character of the court [or "tribunal"]." *Cf. Gliddon v. Zdanok*, *supra*, 370 U.S. at 572.

More generally, what is it that, for Seventh Amendment purposes, distinguishes an administrative adjudicator whose decision must be based exclusively on "the record" to consist of "the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding" (*see* Administrative Procedure Act §7, 5 U.S.C. §§556(d)-(e)) from the Superior Court as a "court of record," *see* D.C. Code §11-901?

Third Circuit *en banc* dissent observes (Irey Cert. App. at 15a-16a):

> "In each case the Court distinguished *Jones & Laughlin* which was raised as a bar to jury trial, as an administrative proceeding. But neither case can be read for the proposition that by calling something an "administrative adjudication" Congress can decide to handle "Suits at common law" without jury trials. No more could have been intended by these distinguishing references to *Jones & Laughlin* than to decide the Court's approval of congressional delegation of Article I power to an administrative agency in cases in which that procedure is constitutionally permissible. As I said in dissenting from the panel decision, there is no constitutional prohibition against referring matters of an equitable nature to an administrative fact-finding tribunal, and back pay incidental to injunctive relief is a traditional equitable remedy. The approving citation of *Whitehead v. Shattuck* in *Pernell v. Southall Realty*, quoted earlier, should dispel any notion that the Court reads *Jones & Laughlin*, as a major surrender of the power of judicial review."

3. The Equitable Remedy Analogy

The OSHA civil penalty scheme is not sustainable on the general theory that the Seventh Amendment has no application to administrative adjudications. Nor can the OSHA scheme be sustained on the government's theory that the penalty is either equitable in nature in light of the Act's enforcement purposes or somehow "ancillary" to administrative abatement orders. *See* Gov. Br. Opp. to Cert., No. 75-748, at 14.

First, if the equity analogy had any force whatsoever here, it would mean that Congress could, consistent with the Seventh Amendment, delegate the entire

OSHA enforcement scheme straight to the "equity side" of the Federal District Courts, without any intervention by an administrative adjudicator. Moreover, if Congress's asserted deterrent purposes behind the OSHA civil penalty justify labelling the remedy "equitable" as opposed to "legal" then every "civil penalty" statute is equitable for Seventh Amendment purposes, regardless of the congressional choice of forums. Neither proposition is tenable. *See* pp. 32-42 *supra*.[29]

[29]Thus, the *en banc* majority in *Irey* expressly declined to place its holding on the "claimed equitable coloration of the Occupational Safety and Health Act . . . ." Irey Cert. App. at 8a.

The *Irey en banc* majority states that this Court's decision in *Katchen v. Landy*, 382 U.S. 323, 327-29 (1966) "is consistent with the treatment accorded administrative determinations in [*Jones & Laughlin*] and furnishes some support for the Secretary's effort to drape the cloak of equity over OSHA's shoulders." *Id.* at 8a.

But the *Katchen* case rests its Seventh Amendment holding squarely on the incontestable status of Bankruptcy Courts as courts of equity and sustains the Bankruptcy Court's power to order return of a preference strictly on the equitable cleanup doctrine. 382 U.S. at 336-38. The passages from *Katchen* quoted in the majority *en banc Irey* decision respecting the Act's purpose to secure a prompt remedy relate to the construction of the statute respecting the Bankruptcy Court's jurisdiction (382 U.S. at 327-29) and were not invoked to justify "equitable coloration" of the incidental remedy for purposes of Seventh Amendment law.

Indeed, since the *Katchen* court observes that " . . . [P]etitioner might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding and awaited a federal plenary action by the Trustee . . . ." 382 U.S. at 336, and squarely places its statutory construction rationale on "the traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering proof of claim and demanding its allowance must abide by the consequences of that procedure," 382 U.S. at 332-33 n. 8, *quoting from Wisswall v. Campbell*, 93 U.S. 347, 351 (1876). *Katchen* would appear on balance to support the Seventh Amendment claim of an involuntary defendant in a civil penalty proceeding.

Second, under the statutory scheme Congress has created, the civil penalties imposed by the Act are in no sense "ancillary" to "the Congressional purpose [of] the swift securing of administrative abatement orders, which are equitable . . ." (Govt. Opp. Cert., No. 75-748, at 14). Thus, the statute provides separately for different penalties for (a) past violations of the Act, punishable by civil penalties of up to $10,000 "for each violation" depending upon the classification of the violation as non-serious, serious, or willful (*see* Section 17(a)-(c), 29 U.S.C. §§666(a)-(c), Irey Cert. App. at 17e and (b) penalties of up to $1,000 "for each day" for failure to correct a violation within the time period specified. §17(d), 29 U.S.C. §666(d), Irey Cert. App. at 17e. Separate administrative proceedings are provided for failure to correct a violation, which are initiated by a separate notice which starts anew the time limits within which the employer may serve his notice of intention to contest. Act, §10(b), 29 U.S.C. §659(b), Irey Cert. App. at 12e. To coerce compliance with these abatement orders, Congress added the unique Draconian touch of authorizing the Secretary "to retroactively assess non-abatement penalties from the date of citation if it finds that the employer-initiated review was not in good faith or was initiated soley for delay or avoidance of penalties." *Sheehan v. OSHRC*, 520 F.2d 1036 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3531 (1976); *see* Act, §17(d), 29 U.S.C. §666(d), Irey Cert. App. at 17e.[30]

[30]Indeed, with respect to "equity", and remedies ancillary to abatement problems, the statute provides specially for District Court jurisdiction under Rule 65 "upon petition of the Secretary" to restrain conditions of danger involving serious risks. *See* Act, §§13(a)-(d), 29 U.S.C. §§662(a)-(d), Irey Cert. App. at 16e.

Most fundamentally, correction of the alleged violation by the OSHA defendant in no way relieves him of a single cent of his liability for the civil penalty assessed pursuant to the administrative proceedings spelled out in Section 10(a) of the Act, 29 U.S.C. § 659(a), Irey Cert. App. at 12e. Conversely, if the employer were to refuse to pay the penalty, it is recoverable only in a separate civil action filed in the United States District Court, leading to an in personam money judgment upon which execution issues exactly like any other civil debt owed any judgment creditor by any judgment debtor. *See* Act, § 17(k), 29 U.S.C. § 666(k), Irey Cert. App. at 18e. Assuming, as in these cases, the employer is only cited for past violations and not for notice of failure to correct,[31] there is nothing whatsoever to which the civil penalties the employers must pay can be said to be "ancillary."

4. The Statutory Source of the Legal Duty

The Government's Brief in Opposition to Irey's Petition for Certiorari suggests a narrower ground for affirmance (Br. in Opp. No. 75-748, at 14) (footnote omitted):

> "These cases [*i.e.*, *NLRB v. Jones & Laughlin Steel Corp.*, *supra*; *Pernell v. Southall Realty*, 416 U.S. 363 (1974); *Curtis v. Loether*, *supra*; *Block v. Hirsh* 256 U.S. 135 (1920), all discussed at pp. 46-65 *supra*] merely restate the settled rule that

[31] *See* Irey Citation for Serious Violation, J. App. at 6a-13a; Atlas Citation for Serious Violation, J. App. at 26a-30a.

> the legislature may abolish a common law remedy and substitute an analogous administrative remedy with no resort to a jury.
>
> "*A fortiori*, Congress may create rights and obligations unknown at common law and establish an expert administrative tribunal to enforce those rights . . . ."

Since there is no question here that the "remedy" [*i.e.*, personal liability for a monetary civil penalty for violating a statute] was "known at common law" in every possible sense of that phrase, the argument must be that the Seventh Amendment is inapplicable to OSHA because the employer's primary duty to provide a safe workplace and otherwise obey OSHA regulations is founded on a federal statute.[32] But this Court

[32] In addition to *Block v. Hirsch*, *supra*, the government, at footnote 7 in the quoted passage, relies on this Court's decision in *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917) for the proposition that "Congress may abolish a common law remedy and substitute an analogous administrative remedy with no resort to a jury." In *Mountain Timber* this Court rejected a claim that the Seventh Amendment prohibited the State of Washington from abolishing an employer's liability for negligence under the common law and substituting a state fund for no fault compensations under state administrative jurisdiction with limited judicial review. (*See* 243 U.S. at 228-34). As the *Mountain Timber* court made clear, the Seventh Amendment in no way prohibits any jurisdictions from eliminating altogether a pre-existing common law substantive theory of personal liability. 243 U.S. at 235 (emphasis added):

> "The 7th Amendment, with its provision for preserving the right of trial by jury, is invoked. It is conceded that this has no reference to proceedings in the state courts (Minneapolis & St. L. R.R. Co. v. Bombolis, 241 U.S. 211, 217), but it is urged that the question is material for the reason that if the act be constitutional it must be followed in the Federal courts in cases that are within its provisions. *So far as private rights of action are preserved, this is no doubt true; but, with respect to those, we find*

(Footnote continued on next page)

squarely rejected the same argument in *Curtis v. Loether, supra,* 415 U.S. at 193-94:

> "Petitioner nevertheless argues that the Amendment is inapplicable to new causes of action created by congressional enactment. As the Court of Appeals observed, however, we have considered the applicability of the constitutional right to jury trial in actions enforcing statutory rights 'as a matter too obvious to be doubted.' 467 F.2d at 1114. Although the Court has apparently never discussed the issue at any length, we have often found the Seventh Amendment applicable to causes of action based on statutes. *See, e.g., Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 477 (1962) (trademark laws); *Hepner v. United States,* 213 U.S. 103, 115 (1909) (immigration laws); *cf. Fleitmann v. Welsbach Street Lighting Co.,* 240 U.S. 27 (1916) (antitrust laws), and the discussion of *Fleitmann* in *Ross v. Bernhard,* 396 U.S. 531, 535-36 (1970).[7] Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the

(Footnote 32 continued from last page)

nothing in the act that excludes a trial by jury. As between employee and employer, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury."

Nothing in *Mountain Timber* suggests that the Court there viewed the no-fault workman's compensation insurance scheme as somehow "analogous" to the common law damages remedy for negligence. Of course, we do not doubt that Congress may abolish the employer's Seventh Amendment jury right by abolishing the employer's substantive liability for violating the statute; beyond that, to the extent the principle of *Mountain Timber* has any relevance to the instant cases, the underlined passages argue for reversal of the rulings here, particularly in light of this Court's subsequent holding in *Byrd v. Blue Ridge Cooperative,* 356 U.S. 525, 533-40 (1958) that in an employee negligence diversity case in federal court, factual disputes over the availability to the defendant-employer under the state workman's compensation law of a substantive statutory defense had to be submitted to the jury.

statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."

II.

POLICY CONSIDERATIONS FAVOR RECOGNITION OF A RIGHT TO TRIAL BY JURY TO DETERMINE LIABILITY FOR AN OSHA CIVIL PENALTY BEFORE FINAL JUDGMENT

A. The Defendant's Right to a Jury Before Final Judgment Comes Within the Clear Command of the Seventh Amendment.

In evaluating the policy factors as they may relate to this Court's determination of the Seventh Amendment issue in these cases, two preliminary observations are in order.

First, as this Court observed in *Curtis v. Loether, supra,* 415 U.S. at 198, in connection with the argument that policy factors undergirding the Civil Rights Act of 1968 and the Thirteenth and Fourteenth Amendments to the Constitution justified non-recognition of a right to trial by jury in that case:

> "More fundamentally, however, these considerations are insufficient to overcome the clear command of the Seventh Amendment."[33]

[33]We note that insofar as the Civil Rights Act rests both on the very general commerce power delegation to the Congress and the specific enforcement powers delegated to Congress under the Thirteenth and Fourteenth Amendments, *see Curtis v. Loether, supra,* 415 U.S. at 198 n. 15, the policy considerations justifying overriding the jury right in the context of the Civil Rights Act would appear to have been stronger than any policy considerations that might be advanced in the context of the Occupational Safety and Health Act, which rests only on the commerce power. *See* Act, §8, 2(b), 29 U.S.C. §651, Irey Cert. App. at 1e.

See also United States v. J. B. Williams Co., supra, 498 F.2d at 428 ("The first point in response is that the footnote in *Ross v. Bernhard* [396 U.S. 531, 538 n. 10 (1970)] was part of an argument for applying the Seventh Amendment right to a jury trial where it had not been recognized before the merger of law and equity – not a suggestion that a type of statute which had uniformly been held to carry the right of jury trial should now be construed to eliminate it.")

Federal governmental statutory actions for civil penalties are – on the basis of some 200 years of practice in the federal courts, English common law, and the specific understanding of the authors of the Seventh Amendment and the First Judiciary Act – a classic illustration of a type of statute which had uniformly been held to carry the right of jury trial before the merger of law and equity under the Federal Rules of Civil Procedure. *See Ross v. Bernhard, supra,* 396 U.S. at 538 n. 10. Indeed, civil penalty actions resulting in monetary in personam judgments constitute "suits, which the common law recognized among its old and settled proceedings . . . ." *Parsons v. Bedford,* 28 U.S. [3 Pet.] 433, 447 (1830). Therefore, such suits are within the core of the Seventh Amendment's umbrella, just as traditional contract suits for damages or personal injury suits for negligence between private parties *inter sese* are within the core of the Seventh Amendment. In these circumstances, we submit that "the clear command of the Seventh Amendment" is in any event controlling.

Second, a fundamental factor in any analysis of policy factors must be the consistent recognition which this Court has given down through the years to the

important position of the Seventh Amendment in the American system of jurisprudence. *See Parsons v. Bedford, supra,* 28 U.S. [3 Pet.] at 446 ("The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy . . . ."); *Dimick v. Schiedt,* 293 U.S. 474, 485 (1935)[34]; *Jacob v. New York City,* 315 U.S. 752-53 (1942) ("The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealousy guarded by the courts.")

These cases are expressive of a constitutional priority of values which has guided this Court's dispositions in a wide variety of different civil jury trial contexts. Thus, for example, in *Byrd v. Blue Ridge Cooperative,* 356 U.S. 525 (1958), despite the acknowledged impinge-

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[34]In *Dimick,* this Court observed (293 U.S. at 485):

> "The right of trial by jury is of ancient origin, characterized by Blackstone as 'the glory of the English law' and 'the most transcendent privilege which any subject can enjoy' (BK 3 p. 379); and, as Justice Story said (2 Story on the Constitution, §1779), '. . . the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms." With, perhaps, some exceptions trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history in jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' "

ment on the fundamental constitutional policies reflected in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), this Court recognized a right to jury trials in diversity suits in federal district courts involving state-created rights because of "affirmative countervailing considerations" (356 U.S. at 537) including "the influence of the Seventh Amendment" (*id.* at 539). And in cases such as *Beacon Theatres v. Westover*, 359 U.S. 500 (1959); *Dairy Queen v. Wood*, 369 U.S. 469 (1962); and *Ross v. Bernhard*, *supra*, where available analogies based on equitable remedies and equitable jurisdictional principles arguably could have doctrinally justified rejection of the jury right, the Court nonetheless insisted on the primacy of the values protected by the Seventh Amendment. And, even where the Court has permitted an encroachment upon the jury right, care has been taken to distinguish between the "substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure." *Colgrove v. Battin*, *supra*, 413 U.S. at 156.

Thus, even assuming *arguendo* that policy considerations may be taken into account in these cases, the government bears a heavy burden in seeking to justify on policy grounds curtailment of the right to a jury trial in these cases.[38]

In this regard, the judgment of the Third Circuit panel majority in the *Irey* case below would appear to be practically dispositive of any policy-based argument (Irey Cert. App. at 8b-9b n. 11 (emphasis added)):

[38]Cases such as *Dimick v. Schiedt*, *supra*; and *Jacob v. New York City*, *supra*, would appear to require a "strict scrutiny" standard of judicial review on any functional approach to a congressional claim of power to override Seventh Amendment policy interests. *See* note 26 *supra*.

"The dissent focuses on another disturbing element of this case – the denial of a jury trial under the Seventh Amendment. The majority, too, has serious misgivings as to the wisdom of limiting *de novo* review but does not agree with the dissent's conclusion of unconstitutionality. . . .

"However, we do share Judge Gibbons' reservations about the extremely limited scope of judicial review and the absence of opportunity to a *de novo* trial on the merits. While the prospect of burdening the courts with large numbers of appeals is a matter of concern from the standpoint of efficient judicial administration, we think experience demonstrates rather conclusively that in cases of this nature *de novo* review is seldom requested. It is the availability of the remedy, not its infrequent utilization, which is important to the cause of justice. The mere existence of a local fire department is a source of satisfaction to the citizen even though he would hope that he would never be forced to seek its assistance.

"*We perceive no overriding consideration which favors the congressional policy of recent years to insulate administrative adjudication from the open and searching examination that full judicial review provides. The necessity for an administrative agency on occasion to submit its determination to the scrutiny of a jury of citizens would be a healthful and disciplining experience.*"

B. The Policy Considerations on Balance Favor Recognition of the Jury Right.

In any event, policy considerations on balance actually affirmatively favor recognition of a right to a jury trial at some stage prior to final judgment of liability for an OSHA civil penalty.

1. It must be borne in mind that an OSHA penalty case – like all civil penalty cases – is a governmental proceeding. The Constitution of the United States provides in three places for jury rights: Article III, Section 3 (Criminal Cases); the Sixth Amendment (Criminal Cases); and the Seventh Amendment (Civil Cases). In *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) this Court explicated the constitutional policies underpinning the criminal jury right (emphasis added):

> "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the Constitution strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge. If the defendant preferred the common-sense judgment of the jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. *Beyond this, the jury trial provisions in the Federal and State constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence . . . .*"

These same policy concerns against arbitrary governmental action are applicable to "civil" penalty proceedings brought by the government. Indeed, as we have argued in the initial section of this brief, they were part of the specific historical concerns of those who wrote the Seventh Amendment into the Constitution. *See* pp. 20-32, *supra*. And, while obviously this policy concern is greater in the context of a criminal proceeding, it is also true that in an administrative civil penalty proceeding the defendant lacks the added and perhaps equally fundamental constraint against biased or eccentric governmental action embodied in a life-tenured Article III federal judge.

Moreover, in an OSHA-type penalty adjudication, there is a specific convergence of the constitutional values underpinning criminal and civil jury rights not present to the same degree in other instances of administrative civil penalty adjudications. The panel majority in the *Irey* case, in response to Irey's contention that OSHA penalties were criminal penalties for purposes of application of the applicable constitutional safeguards in criminal cases, stated (Irey Cert. App. at 7b):

> "In the case *sub judice*, candor compels us to concede that the punitive aspects of the OSHA penalties, particularly for a 'willful' violation, are far more apparent than any 'remedial' features . . . ."

And the Fifth Circuit in the *Atlas* case expressly reserved the question whether a "willful" violation

could be the subject of a non-jury "civil enforcement" proceeding. Atlas Cert. App. at 14a n. 39. Even taking into account the "dialectical subtleties" involved in distinguishing criminal from civil penalties for constitutional purposes, *see United States ex rel. Marcus v. Hess*, 317 U.S. 537, 554 (1943) (Frankfurter, J. concurring), it is apparent that the OSHA "civil" penalty at the very least comes close to the line.

In these cases, those portions of the petitions for certiorari addressed to the question whether the OSHA civil penalties are criminal penalties within the meaning of the Constitution were denied. *See* J. App. at 40a-41a. We therefore do not urge this question here. But in *United States v. United States District Court*, 407 U.S. 297, 313 (1972), this Court, as part of its analysis holding on Fourth Amendment grounds that warrants are required in domestic national security wiretapping cases, relied in direct part on the "convergence of First and Fourth Amendment values" present in national security cases and "not present in cases of 'ordinary' crime." *See* 407 U.S. at 313. A similar analysis is appropriate in the instance of the convergence of constitutional values underpinning the Sixth and Seventh Amendments in the specific context of an OSHA civil penalty adjudication.

2. Because of the nature of the employer's primary conduct giving rise to the government's charge of an OSHA violation "the practical abilities and limitations of juries" *Ross v. Bernhard, supra*, 396 U.S. at 538 n.

10, constitute a significant policy factor justifying recognition of the jury right in these cases.[36]

The issues involved in these cases are eminently suitable for jury disposition. Indeed, those issues fall within the traditional range of jury-fact questions in which the experience, views and attitudes of laymen are particularly valuable as a check against the tendencies to bureaucratic insularity and overreaching which can arise in any law enforcement enterprise when government officials believe themselves to be pursuing citizens who have engaged in such socially harmful conduct as maintaining a workplace which contains "recognized hazards that are causing or likely to cause death or serious physical harm to [their] employees" (Act, § 5,(a), 29 U.S.C. § 654(a)(1), Irey Cert. App. at 4e) (the "general duty" clause) or allowing a condition in a place of employment where "there is a substantial probability that death or serious physical harm could result . . . [when the employer knew or] with the exercise of

[36]We note that under this Court's decisions juries are called upon to decide the most complex and complicated issues of anti-trust, trademark, patent infringement and corporate law. *E.g., Dairy Queen v. Wood, supra; Beacon Theatres v. Westover, supra; Ross v. Bernhard, supra.* As the Court observed in *Dairy Queen, supra*, respecting this policy factor, 369 U.S. at 478:

> "In view of the powers given to the district courts by Federal Rule of Civil Procedure 53(b) to appoint masters to assist the jury in those exceptional cases where the legal issues are too complicated for a jury adequately to handle alone, the burden of such a showing is considerably increased and it will indeed be a rare case in which it can be met."

Thus, this factor can rarely, if ever, operate as a factor justifying overriding the jury right.

reasonable diligence, [could have known] of the presence of the violation" (§ 17(k), 29 U.S.C. § 666(j), Irey Cert. App. at 18e) (the "serious" violation charged against Atlas) or "knowingly, consciously, and deliberately" creating a risk which actually kills one of his employees (the "willful" violation against Irey as interpreted by the Third Circuit below, *see* p. 82, *infra*).

And none of these issues involve any complexities taxing the practical abilities of juries. For example, in the *Irey* case, the principal charge was that "respondent willfully violated 29 C.F.R. 1926.652(b) by failing to shore, sheet, brace, slope or otherwise support by means of sufficient strength the sides of a trench located at the aforementioned work site." Secretary's Complaint in No. 75-748, ¶IV, J. App. at 15a. The OSHA regulation, 29 C.F.R. 1926.652(b) states (Irey Cert. App. at 2c):

> "Sides of trenches in unstable or soft material, five feet or more in depth, shall be shored, sheeted, braced, sloped or otherwise supported by means of sufficient strength to protect the employees working within them. See Tables P-1, P-2."
>
> "Table P-1: approximate angle of repose for sloping of sides of excavations: solid rock, shale or cemented sand and gravel – 90°. Compacted angular gravel – 1/2 to 1. Average soils – 1 to 1."

Chairman Moran's dissent from the Occupational Safety and Health Review Commission's opinion in the *Irey* case summarizes the evidence as follows:

> "The evidence reveals that on November 23, 1971, nearly two months prior to the cave-in, which is at issue in this case, respondent had employees engaged in digging a trench for the laying of an electrical conduit at the Evandale campus of West Virginia University. The trench wall had not been sloped or shored. Respondent's superintendent thought that the material in which they were digging was composed of shale, a material requiring no sloping or support under the Occupational Safety and Health standard quoted above. He reached this conclusion after reading the results of a soil analysis which had been undertaken at the direction of the prime contractor for this particular job. However, unbeknown to respondent, its superintendent misread the chart and the shale actually started 1/2 foot below the trench bottom. The trench walls were weathered shalely limestone of silty clay.
>
> "On the same day, an inspector from the State of West Virginia Labor Department visited respondent's work site and advised that due to rainy weather and snow conditions, the ground was thoroughly wet and dangerous and ordered that the trench walls be sloped. This was accomplished. Subsequently, however, weather conditions improved and respondent returned to the digging of vertical trenches.
>
> "On January 11, 1972, respondent was still engaged in trenching operations at the University site. There had been a rainfill the previous night, and the collected rainwater had been pumped from the trench in the morning. A cave-in occurred that day while one of respondent's employees was in the trench, causing his death. This citation for willful violation followed."

See Irey Cert. App. at 2c-3c.

Irey, as noted, was cited for a "willful" violation under Section 17a of the Act and received a $7,500 proposed penalty, (subsequently reduced to $5,000). The hearing officer found a willful violation under the

Act and the Commission affirmed over Chairman Moran's dissent. On review of the facts the Court of Appeals for the Third Circuit ruled that the Commission had applied the wrong legal standard for a "willful" violation (Irey Cert. App. at 11b-12b):

> "The Act defines a 'serious' violation as one which requires proof of a substantial probability that condition, 'unless the employer did not, and could not with the exercise of reasonable diligence know of the presence of the violation.' To rephrase, a finding of a 'serious' violation requires that the condition was hazardous and that the employer knew or should have known of it – precisely the alternative definition of 'willful' which the hearing officer adopted.
>
> "It is obvious from the size of the penalty which can be imposed for a 'willful' infraction – ten times that of a 'serious' one – that Congress meant to deal with a more flagrant type of conduct than that of a 'serious' violation. Willfulness connotes defiance or such reckless disregard of the consequences as to be equivalent to a knowing, conscious and deliberate flaunting of the Act. Willful means more than merely voluntary action or omission – it involves an element of obstinate refusal to comply."

The essential factual question raised for jury determination in such a case – *i.e.*, whether Irey recklessly created a homicidal risk with respect to one of its employees – is not only well within the range of the practical limitations and abilities of juries, but the sort of question on which any citizen in our society has a right to invoke the judgment of his peers before he is stigmatized with a finding of liability. More generally,

there is not a single factual question or legal standard which can seriously be described as too "complex" for jury understanding in the entire range of violations raised in both the *Irey* and *Atlas* cases. *See*, J. App. at 14a-16a (Complaint in *Irey* case); *id.*, 31a-33a (Complaint in *Atlas* case).

3. No legitimate argument can be made in this case that recognition of a defendant's right to a jury trial will in any way result in crowding the dockets of the district courts or overburdening the administration of justice. Throughout our nation's history the consistent and – until recent years – almost unbroken practice with respect to civil monetary penalty adjudications has been to recognize a right to a trial by jury at some stage prior to final judgment of liability for the penalty. Thus, Appendix A to Professor Goldschmid's report includes a compilation of the results of a survey of the use of civil money penalties by federal administrative agencies conducted in 1971. This compilation shows that of the 34 agencies listed, 30 permitted *de novo* judicial review. 2 Recommendations and Report of the Administrative Conference of the United States, 948-52, (July 1, 1970 - December 31, 1972). [Hereinafter cited as "Goldschmid".] The overwhelming experience is that the civil penalty cases are settled without ever getting

to district court.[37] Therefore, there is simply no basis for a priori speculations that recognizing a *de novo* jury trial right in the context of the OSHA scheme is going to result in overburdening the federal courts. In fact, Professor Goldschmid's own report specifically rejects that possibility (Goldschmid at 931) (footnote omitted):

> "All evidence points to settlements or uncontested assessments taking place under an administrative imposition system at about the same rate as they take place at an agency level now. Under the Occupational Safety and Health Act of 1970, for example, 7,450 citations were issued, and $512,067 assessed, during the first five months of the 1972 fiscal year; fewer than 5% of these citations were contested by a request for a hearing before the OHSRC. . . ."

Indeed, upon proper analysis the judicial economy consideration is actually a strong a fortiori argument for recognition of the jury right in the context of civil penalty proceedings. Thus, if the federal courts are overburdened, it is because of categories of litigation

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[37]Professor Goldschmid reports, *id.* at 921 n. 41:

> "Of the 80,435 civil cases terminated in federal district courts in the 1970 fiscal year, only 9,449 were terminated after trial (see Director of the Administrative Office of the United States Courts, 1970 Annual Report 107, 127 (1971)). Settlements undoubtedly accounted for a substantial part of the remainder. Of course, of the 15,608 money penalty cases processed by federal agencies in fiscal 1971, well over 90% were settled. If settlements did not occur, there would probably be no way of absorbing the additional cases in a system 'already being engulfed by a tidal wave of litigation' . . . [citations omitted]."

such as diversity suits between private parties *inter sese* (where this court has recognized a jury trial right even if under applicable state law there would be no right, *see Byrd v. Blue Ridge Cooperative, supra*); and other categories of traditional private litigation carrying jury rights. Moreover, out of regard for the right to trial by jury as a "basic and fundamental feature of our system of federal jurisprudence", *Dice v. Akron, C. & Y. Ry.*, 342 U.S. 359, 363 (1952) *quoting from Bailey v. Central Vermont R. R.*, 319 U.S. 350, 354 (1952), this Court has, albeit as a matter of statutory construction, interpreted the Federal Employer's Liability Act to impose on state courts an obligation to grant jury trial rights for determination of disputed factual issues even where under the applicable state law there would be no right to trial by jury. Thus, even assuming *arguendo* considerations based on allocation of federal judicial decision-making resources are a legitimate policy consideration, the civil penalty cases would be the last place a plausible argument could be made for encroaching upon the category of cases encompassed by the Seventh Amendment.[38]

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[38]In concurring in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 411 (1971) Mr. Justice Harlan observed:

> "Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of recognition of otherwise sound constitutional principles."

4. Nor is there any likelihood of substantial interference with the agency's law enforcement goal, even assuming *arguendo* that this is a legitimate policy interest that the government might advance as justifying defeating a claim of constitutional right on the part of the defendant to a procedural protection in a law enforcement proceeding brought by the government against him. Thus, for Seventh Amendment purposes, the right to a jury trial need only come at some stage prior to final judgment. The administrative process then could still go forward exactly as it presently does, with no need to call in a jury to participate in the case with the administrative law judge. In the overwhelming number of cases, the penalty adjudication proceeding will never get beyond the administrative process; only in those numbers of cases where the size of the penalty or the nature of the charge is of sufficient seriousness to justify a private employer's investing in the substantial costs of further litigation would there be any prospect of seeking *de novo* judicial review. Moreover, it must be borne in mind that the *de novo* review would occur after a testimonial and evidentiary record has already been made in the administrative process.[39] Necessarily, then, the prospect of "frivolous" cases or "delaying" tactics being utilized in district court are minimal. The only way the case could go forward is if there is a significant and serious factual dispute (that has not already been clarified through the process of administrative adjudication) which would

[39]The variety of devices available generally to avoid waste and duplication in *de novo* review proceedings are evaluated in *Hackley v. Roudebush*, 520 F.2d 108, 149-59 (D.C. Cir. 1975). *See also* Pernell v. Southall Realty, *supra*, 416 U.S. at 384.

justify a United States District Judge in permitting the case to go beyond the summary judgment stage. And, of course, it is in just such a category of cases – *i.e.*, where the defendant is not satisfied with the justice he received at the hands of the Executive branch of the government and can still raise a serious factual question in the face of a sworn evidentiary record, and is willing to invest in the substantial litigating costs involved in pursuing a lawsuit against the government of the United States – that he should have a right to do so and to invoke the intervening judgment of his peers.

CONCLUSION

We close with two quotations, one from the author of the Bill of Rights and one from the author of the Declaration of Independence.

James Madison once counselled, in reference to the necessity of a separation of the departments of government,

> "Temporary deviations from fundamental principles are always more or less dangerous. When the first pretext fails, those who become interested in prolonging the evil will rarely be at a loss for other pretexts. The first precedent, too, familiarises the people to the irregularity, lessens their veneration for those fundamental principles, and makes them a more easy prey to ambition and self interest. Hence it is that abuses of every kind, when once established, have been so often found to perpetuate themselves." Letter from James Madison to John Brown, dated August 23, 1785, 2 *Works of Madison* 183 (1900).

On February 2, 1788 Thomas Jefferson wrote William Stephens Smith concerning the deletion of the civil jury right from the original draft of the Constitution (Thomas Jefferson Papers, Princeton University Press, 1950, Vol. 12 at 558):

> "I am glad to learn by letters which come down to the 20th. of December that the new constitution will undoubtedly be received by a sufficiency of the states to set it a going. Were I in America, I would advocate it warmly till nine should have adopted, and then as warmly take the other side to convince the remaining four that they ought not to come into it till the declaration of rights is annexed to it. By this means we should secure all the good of it, and procure so respectable an opposition as would induce the accepting states to offer a bill of rights. This would be the happiest turn the thing could take. I fear much the effects of the perpetual re-eligibility of the President. But it is not thought of in America, and have therefore no prospect of a change of that article. But I own it astonishes me to find such a change wrought in the opinions of our countrymen since I left them, as that threefourths of them should be contented to live under a system which leaves to their governors the power of taking from them the trial by jury in civil cases, freedom of religion, freedom of the press, freedom of commerce, the habeas corpus laws, and of yoking them with a standing army. This is a degeneracy in the principles of liberty to which I had given four centuries instead of four years. But I hope it will all come about. We are now vibrating between too much and too little government, and the pendulum will rest finally in the middle. Adieu, yours affectionately,
>
> TH: JEFFERSON

For the foregoing reasons, the judgments of the Courts of Appeals should be reversed.

Respectfully submitted,

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